Supreme Court, U.S.
FILED
JUL 19 2010
OFFICE OF THE CLERK

No. 10-108

In The Supreme Court of the United States

DONALD LEE KING and TINA MARIE KING,

Petitioners,

v.

PIONEER REGIONAL EDUCATIONAL SERVICE AGENCY,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Georgia Third Division

PETITION FOR A WRIT OF CERTIORARI

ERIC SCHNAPPER*
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@u.washington.edu

E. WYCLIFFE ORR, SR.
SPENCE JOHNSON
DUSTIN MARLOWE
ORR BROWN JOHNSON LLP
P.O. Box 2944
Gainesville, GA 30505
(770) 534-1980

Attorneys for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Can a constitutional claim against a local government body be based on the combined action of several officials, where no single official by himself violated the Constitution?

PARTIES

The parties are set forth in the caption.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties	ii
Opinions Below	1
Jurisdiction	1
Statutory Provision Involved	2
Statement	2
(1) Events Leading To The Death of Plaintiffs' Son	3
(2) The Proceedings Below	17
Reasons for Granting The Writ	26
I. There Is An Important Conflict Among The Lower Courts Regarding The Inter-Relationship of Individual and Government Liability for Constitutional Violations	26
II. This Case Presents An Excellent Vehicle for Resolving The Conflict	38
III. The Decision of The Georgia Court of Appeals Is Clearly Incorrect	39
Conclusion	41

Appendix

Opinion of the Court of Appeals of Georgia, November 5, 2009 ..... 1a

Order of the Superior Court of Hall County, January 21, 2009 ..... 26a

TABLE OF CONTENTS – Continued

Page

Order of the Supreme Court of Georgia Denying Certiorari, April 19, 2010 .....43a

TABLE OF AUTHORITIES

Page

Cases

Altman v. City of High Point, N.C., 330 F.3d 194 (4th Cir. 2003) 28

Anderson v. City of Atlanta, 778 F.2d 678 (11th Cir. 1985) 23, 24, 37

Barrett v. Orange County Human Rights Comm'n, 194 F.3d 341 (2d Cir. 1999) 33, 34

Blackmore v. Kalamazoo County, 390 F.3d 890 (6th Cir. 2004) 29

Brown v. Commonwealth of Pennsylvania Dept. of Health, etc., 318 F.3d 473 (3d Cir. 2003) 36, 38

City of Birmingham v. Major, 9 So. 3d 470 (Ala. 2008) 30

City of Los Angeles v. Heller, 475 U.S. 796 (1986) .....*passim*

Crocker v. County of Macomb, 119 Fed. Appx. 718 (6th Cir. 2005) 29

Crumpe v. Bowman, 1995 WL 255934 (4th Cir. 1995) 28

Curley v. Village of Suffern, 268 F.3d 65 (2d Cir. 2001) 34

DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189 (1989) 18, 20, 21

Dodd v. City of Norwich, 827 F.2d 1 (2d Cir. 1987) 34

Estate of Harbin v. City of Detroit, 147 Fed. Appx. 566 (6th Cir. 2005) 29

TABLE OF AUTHORITIES – Continued

Page

Evans v. Avery, 100 F.3d 1033 (1st Cir. 1996) 37

Fagan v. City of Vineland, 22 F.3d 1283 (3d Cir. 1994) 36, 37

Fairley v. Luman, 281 F.3d 913 (9th Cir. 2002).....35

Garcia v. Salt Lake County, 768 F.2d 303 (10th Cir. 1985) 37

Gibson v. County of Washoe, Nev., 290 F.3d 1175 (9th Cir. 2002).....35

Grazier v. City of Philadelphia, 328 F.3d 120 (3d Cir. 2003).....36

Hayden v. Grayson, 134 F.3d 449 (1st Cir. 1998) 30

Hildebrandt v. City of Fairbanks, 957 P.2d 974 (Alaska 1998) 38

Hoard v. Sizemore, 198 F.3d 205 (6th Cir. 1999).....29

Hopkins v. Andaya, 958 F.2d 881 (9th Cir. 1992) 35

International Ground Transp. v. Mayor and City Council of Ocean City, Md., 475 F.3d 214 (4th Cir. 2007) 28

Klemencic v. Ohio State University, 263 F.3d 504 (6th Cir. 2001) 29

Kopf v. Wing, 942 F.2d 265 (4th Cir. 1991) 28

Owen v. City of Independence, 445 U.S. 622 (1980).....27, 40

Parrish v. Luckie, 963 F.2d 201, 207 (8th Cir. 1992).....33

TABLE OF AUTHORITIES – Continued

Page

Robbins v. Cumberland County Children and Youth Services, 802 A.2d 1239 (Pa. 2002).....38

Roberts v. Anderson, 213 Fed. Appx. 420 (6th Cir. 2007).....29

Rutigliano v. City of New York, 326 Fed. Appx. 5 (2d Cir. 2009).....34

Speer v. City of Wynne, Arkansas, 276 F.3d 980 (8th Cir. 2002).....32, 33, 39

Thomas v. Cook County Sheriff's Department, 604 F.3d 293 (7th Cir. 2009).....31, 32

Watkins v. City of Battle Creek, 273 F.3d 682 (6th Cir. 2001).....29

Waybright v. Frederick County, Md., 528 F.3d 199 (4th Cir. 2008).....28

Whitlow v. City of Louisville, 39 Fed. Appx. 297 (6th Cir. 2002).....30

STATUTES

28 U.S.C. § 1257(a).....1

42 U.S.C. § 1983 .....*passim*

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Georgia State Board of Education, Rule 160-5-1-.35, section 1(e) 24

Georgia State Board of Education, Rule 160-5-1-.35, section 2(a) 24

General Accounting Office, Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers, Testimony Before the Committee on Education and Labor, House of Representatives, May 19, 2009.....25

Petitioners Donald Lee King and Tina Marie King respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the Georgia Court of Appeals, Third Division, entered on November 9, 2009.

OPINIONS BELOW

The November 9, 2009 opinion of the Georgia Court of Appeals, which is reported at 301 Ga.App. 547, 688 S.E.2d 7 (2009), is set out at pp. 1a-25a of the Appendix. The January 21, 2009, order of the Superior Court of Hall County, Georgia, which is not reported is set out at pp. 26a-42a of the Appendix. The April 19, 2010, order of the Supreme Court of Georgia denying certiorari, which is not reported, is set out at p. 43a of the Appendix.

JURISDICTION

The decision of the Georgia Court of Appeals was entered on November 5, 2009. The order of the Supreme Court of Georgia denying review was entered on April 19, 2010. The Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

Section 1983 of 42 U.S.C. provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT

In November 2004 Jonathan King, an emotionally disturbed 13 year old student, committed suicide while confined alone in a "Seclusion Room" in a Georgia public school. Jonathan had repeatedly threatened to kill himself, and had made such a threat on a previous occasion when locked in the Seclusion Room. The Georgia Court of Appeals held that the constitutional claim subsequently brought by his parents was not viable because the school officials who knew about the suicide threats had never disclosed those threats to the officials who confined Jonathan in the Seclusion Room. The correctness of that decision turns on a longstanding inter-circuit conflict regarding this Court's decision in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986).

(1) Events Leading To The Death of Plaintiffs' Son

In Georgia a network of regional school agencies operate special schools for students with serious emotional behavior disorders. The defendant in this case, Pioneer Regional Educational Service Agency, operated several such schools, including the Alpine Psychoeducational Program in Gainesville, Georgia. Jonathan King first enrolled at Alpine in the fall of 2002, at the age of 11, and over the subsequent two years he attended Alpine intermittently during periods when he was not attending his standard public school. Jonathan had a history of depression, psychiatric instability, and psychiatric hospitalization, and was at the Alpine school because of those serious emotional problems.

Officials at Alpine utilized a "Seclusion Room" (also referred to as the "Time-Out" room) for dealing with students. "The time-out room ... is an approximately eight-foot-by-eight-foot room without furniture and with only one entrance. The door to the room can be locked from the outside and has a small glass window, which is protected by a metal grate." (App. 4a). At the time when Jonathan died, the sole window was covered from the outside by a piece of paper or cloth so that the confined student could not see out.[1] A student confined to the room was prevented from opening the door by a bar that was placed across the

---

[1] Stover Dep. at 141; Baghose Dep. at 145.

door by a member of the school staff.[2] A student would normally be confined in the room alone, without any school staff or any other student.

At one time the Alpine school had had in effect a number of essential safeguards regarding use of the Seclusion Room which would likely have prevented Jonathan's suicide. First, those earlier rules required that a student in the room be at all times under the observation of a staff member.

> Students placed in the time-out room are to be continuously monitored by the teacher or staff member who placed the student in time-out.... The teacher or staff member will stand outside the door or be in the time-out room with the student.... [T]he time-out room should ... provide the means by which an adult could continuously monitor, visually and auditorily, the student's behavior.[3]

The purpose of the window was to "allow[ ] the teacher to monitor the student's behavior." Second, a student could not be alone in the room for more than fifteen minutes. "The student should not be placed in the time-out room for longer than 15 minutes without a teacher or staff member in the time-out room with

---

[2] Stover Dep. Ex. 10.

[3] Stover Dep. Ex. 14; *see* Stover Dep. at 201:

> Q. Am I accurate in saying that Exhibit 14 requires continuous monitoring. Do you see there in the fifth paragraph, first sentence?
>
> A. I see that sentence, yes, sir.

them."[4] Third, those former rules required that nothing be in the room "with which the student could harm him/herself."[5] Fourth, any confinement for more than fifteen minutes was generally disapproved;[6] confinement for more than fifteen minutes was permitted only if a school official known as a Coordinator[7] expressly approved that longer period and initialed the Time-Out form.[8] The school's Director acknowledged that these safeguards probably would have prevented Jonathan from killing himself.[9]

---

[4] Stover Dep. Ex. 14.

[5] *Id.*; *see id.* (nothing should be in the room "with which children could harm themselves").

[6] Stover Dep. Ex. 14 ("Be sure that the duration of each time-out is brief. One to five minutes generally is sufficient. It is doubtful that time-out periods exceeding fifteen minutes serve the purpose for which they are intended (temporary withholding of positive reinforcement").

[7] Neither of the officials involved in confining Jonathan was a Coordinator.

[8] Stover Dep. Ex. 14.

[9] Stover Dep. at 206:

> Q. If Jonathan King had been subject to continuous monitoring in the time-out room on November 15, 2004, would he have had an opportunity to hang himself?
>
> A. Had someone been watching him without taking their eyes off him the entire time, he probably would not have been successful.
>
> Q. That's what continuous monitoring means isn't it?
>
> A. Well, it doesn't say continuous visual monitoring, but certainly it implies that, I would agree.

(Continued on following page)

When Jonathan was confined in the Seclusion Room on November 15 2004, however, these written rules were no longer in force.[10] The new abbreviated "Instructions" for use of the Time-Out room contained no requirement of continuous monitoring of the student and no requirement that a staff member be in the room if confinement lasted more than fifteen minutes. Confinement for a greater length of time did not require special authorization. Students were to be searched only for "hazardous articles," a limitation clearly narrower than the earlier ban on any articles which a student could use to harm himself.[11] The form in use at that time required a "visual check" on the student only once every fifteen minutes.[12] There was no requirement that a staff member "stand" outside the room; a seated staff member would not have been high enough to see through the window, which was located about five feet above the ground.[13]

See Stover Dep. at 201:

> Q. Am I accurate in saying that Exhibit 14 requires continuous monitoring? ....
>
> A. I see that sentence, yes, sir.
>
> Q. It says the official policy of Alpine before the enactment of Exhibit 10 required continuous monitoring of students in time-out, right?
>
> A. That's what it says, yes, sir.

[10] Stover Dep. at 199.

[11] Stover Dep. Ex. 10.

[12] *Id.*

[13] Stover Dep. at 141.

Jonathan was enrolled at Alpine in the Fall of 2004 from mid-September until his death in November, except for an eleven day period when he was in a psychiatric hospital. Jonathan was locked in the Seclusion Room on 19 of the 29 days on which he attended the school in the fall of 2004, for time periods averaging 88 minutes.[14] These included confinements of as long as seven hours on a single day.[15]

On repeated occasions in conversations with Anna Arthur, a school aide, Jonathan discussed killing himself.[16] Jonathan's mother on several occasions

---

[14] Stover Dep. Ex. 11.

[15] On October 27, 2004, Jonathan was confined in the Seclusion Room from 9:30 in the morning until 5:20 in the evening. On that date Jonathan threatened to kill himself, a threat he carried out several weeks later when again confined in the Seclusion Room.

[16] Arthur Dep. at 19-21:

> Q. Did Jonathan ever mention the word suicide around you?
>
> A. Yes.
>
> Q. When and – well, first of all, when?
>
> A. I don't recall.
>
> Q. Can you even give me any idea how long it was before his death?
>
> A. I would say probably six to eight weeks.
>
> * * *
>
> Q. What did Jonathan say to you about suicide?
>
> A. "I'm going to kill myself."
>
> * * *

(Continued on following page)

reported to Arthur that Jonathan had made suicide threats when at home.[17] The School Director, Stanley Stover, was unable to recall how many suicide threats Jonathan had made.[18] On October 26, 2004, a day during which Jonathan was confined in the Seclusion Room for two periods totalling more than seven hours, Jonathan tore off the hem of his shirt and wrapped it around his neck in a suicide gesture.[19] On

---

Q. Do you specifically remember other conversations with him when he mentioned suicide?

A. Yes.

Q. How many other conversations?

A. I don't recall.

* * *

Q. What did he say during those conversations to your recollection?

A. "I'm going to kill myself."

[17] Arthur Dep. at 33:

Q. On how many occasions did Mrs. King tell you that Jonathan King was making suicidal threats at home?

A. At least twice.

[18] Stover Dep. at 164:

Q. Can you give me any estimate as to how many other times you say that Jonathan made suicide threats besides these two incidents?

A. I can't give you a specific number.

[19] Baghose Dep. at 141:

Q. Was it a suicide gesture?

A. Someone might interpret it as suicidal.

Stover Dep. at 162:

(Continued on following page)

October 27, 2004, a day on which Jonathan was held in the Seclusion Room from 9:30 in the morning until 5:20 in the afternoon, Jonathan again expressly threatened to kill himself.[20] On one or both of these days, according to the defendant's own records, Jonathan while locked for hours in the Seclusion Room yelled, cried, mumbled, beat on the door, vomited, dug into his ear until it bled, exclaimed that the "walls [are] caving in," and said he was "going to break his arms off and beat himself w[ith] them!"[21]

Information about these repeated suicide threats was not shared among the Alpine school staff. Anna Arthur did not disclose to anyone the information she had received from Jonathan's mother about his suicide threats.[22] Judy Baghose, who witnessed the suicide gesture on October 26, could not "recall" if she

---

> A. I know what Jonathan said about and I know what he did with the shirt. I would term it a suicidal ideation....
>
> A. Well, to me the ideation means he's thinking about it, talking about it.

[20] Baghose Dep. at 155; Stover Dep. Ex. 11. The Time Out log for that date contains the handwritten note "Threatening to kill himself."

[21] Stover Dep. Ex. 11, Time Out/Seclusion Documentation for October 26, 2004 and October 27, 2004.

[22] Arthur Dep. at 34:

> Q. What did you do with that information once you got it from Mrs. King?
>
> A. Nothing, besides talk to her.

ever told anyone about it.[23] The school's Associate Director, psychologist Diana Henning, testified that she did not know about the suicide threat of October 27 until after Jonathan's death,[24] and that she did not know about the suicide gesture of October 26 until she was deposed several years later.[25] Jonathan's mother, who picked him up after school on October 26 and 27, was not told by the school staff about Jonathan's suicide threat and gesture on those

---

[23] Baghose Dep. at 142.

Q. Did you ever report what happened at 1:55 [on the 26th] to anybody?

A. I don't recall.

[24] Henning Dep. at 149:

Q. And then on the 27th of October, 2004, assume that while in the seclusion room he threatened to kill himself?

A. Okay.

Q. Is that information – well, first of all, do you ever recall having been made aware of such information before he died.

A. I'm not aware of it.

Q. Should you have been made aware of that information?

A. Not necessarily, no, I meant that was not required.

[25] Henning Dep. at 145:

Q. Are you aware that when Jonathan was in the seclusion room on the 26th of October 2004, that he tore the hem out of his shirt and wrapped it around his neck?

A. No.

days.[26] Four teachers and paraprofessionals who worked with Jonathan testified that they had never been told about any of his suicide threats.[27]

---

[26] Tina King Dep. at 176-77:

> Q. Do you recall anybody talking to you about what had happened ... ?
>
> A. No, the only thing I recall is she told me that while he was in time-out on the first day that he had torn up his shirt while he was in time-out and that's the only thing I recall she said....
>
> Q. Did she tell you anything about him wrapping pieces of the shirt around his neck?
>
> A. No
>
> * * *
>
> Q. Do you recall anyone discussing with you that at any point in the time-out room on either of those days Jonathan had said anything about hurting himself or killing himself?
>
> A. Definitely not.

[27] Norrell Dep. at 17:

> Q. Did anyone else ever tell you that Jonathan had made any kind of suicidal threats or gestures?
>
> A. I don't think so.

Norrell was a paraprofessional who helped Jonathan with his work. *Id.* at 15-16.

Rahall Dep. at 42:

> Q. Did anyone ever come to you before Jonathan King died and advise you that he had made any suicidal threats or gestures at [the school]?
>
> A. (Nodded no) No.

Rahall was a teacher whom Jonathan contacted to get the macramé rope to hold up his pants, the rope with which he later hung himself. *Id.* at 12-14.

(Continued on following page)

The decision to confine Jonathan in the Seclusion Room on the day he killed himself, and to permit him to keep with him the rope belt he used to hang himself, was made by two other officials, Kenneth Trotter and Douglas Jackson. Trotter testified that at the time he and Jackson confined Jonathan to the Seclusion Room, he was unaware of Jonathan's prior suicidal threats and gesture, including the threat and gesture that had occurred on two prior occasions when Jonathan was confined there.[28] Jackson

---

Kinsey Dep. at 18:

> Q. Okay, had anybody else ever told you that Jonathan said or did anything that would indicate a suicidal tendency?
>
> A. No.

Kinsey was Jonathan's regular teacher in the fall of 2004.

Wright Dep. at 16:

> Q. Anybody else ever tell you that he made any suicidal threats?
>
> A. No
>
> Q. Before he died, did anybody else ever tell you that he had made any suicidal gestures?
>
> A. No.

Wright was a paraprofessional who generally was in contact with Jonathan 45 minutes a day. *Id.* at 6, 18.

[28] Trotter Dep. at 135-36:

> Q. Okay. Prior – prior to the time when you and Mr. Jackson placed Jonathan in the seclusion room on November 15 of 2004, did anyone make you aware of any prior suicidal threats or gesture of any description by Jonathan?
>
> A. No, they did not.

testified that he could not recall anyone on the school staff telling him about the suicide threats.[29] The school Director, Stanley Stover, who knew about the Seclusion Room suicide gesture of October 26, did not disclose it to Trotter, but instead assured Trotter that Jonathan would not harm himself.[30]

Several school officials insisted their handling of information about the suicide threats was proper. Director Stover testified that there was "no reason" to notify the staff who put Jonathan in the Seclusion Room on November 15 that he had threatened to kill himself on prior occasions when he had been confined there.[31] Stover also explained that there was no need to notify anyone about the incident of October 26th.[32]

---

[29] Jackson Dep. at 42, 44.

[30] Trotter Dep. at 44; Trotter Affidavit, par. 5 ("Mr. Stover said, 'I'm very familiar with this child, and he likes himself too much to hurt himself,' or words to that effect. Mr. Stover also indicated to me that Jonathan had never shown any tendency to harm himself.").

[31] Stover Dep. at 139:

> Q. Should an individual placing Jonathan in the seclusion room on November 15, 2004, have known about the events of October 26 and 27 of 2004?
>
> A. No, sir, there was no reason they should know that.

[32] The school's Director explained that there was no need to notify anyone about the incident on October 26 because the incident was observed by a Coordinator, and the school policy required only that a Coordinator be notified.

> Q. What should have been done with that information?

(Continued on following page)

Associate Director Henning insisted that there was no reason why she should have been told about the suicide threat and gesture that occurred in the Seclusion Room.[33] Trotter, on the other hand, testified that if he had known about Jonathan's earlier suicide threats, he would not have permitted Jonathan to keep in the Seclusion Room the rope belt which Jonathan used to kill himself.[34]

On the day of Jonathan's death, he arrived at school without a belt. A school official who was

---

A. It should have been reported to the coordinator.

Q. Was it?

A. Well, ... it looks like Judy Baghose was involved in that, and would have seen his sheet....

Q. What should Judy Baghose have done?

A. Well, Judy is a coordinator. It is not required that only [school psychologist] Diana Henning can make an assessment.

Stover Dep. at 97.

[33] *See* n.24, *supra*.

[34] Trotter Dep. at 136:

Q. Okay, Based on all of your observations and all of your knowledge leading up to that time, if someone had told you that Jonathan had threatened suicide in the seclusion room in the recent past, would you have consented to his being placed in that room with that rope?

MS. PEARSON: Objection.

THE DEPONENT: No, I wouldn't have.

Trotter Affidavit, par. 11 ("If I had known that Jonathan had threatened suicide in the past while in the seclusion room, I never would have allowed him to keep the makeshift belt").

unaware of Jonathan's prior suicide threats[35] helped Jonathan obtain a length of macramé rope to use as a belt. Later in the day, a newly hired paraprofessional, Kenneth Trotter, decided that Jonathan should be confined in the Seclusion Room. Trotter had no previous work experience at an educational institution, and this only was his second day at work at the school.[36] Once in the room, a teacher, Douglas Jackson, asked Jonathan if the makeshift belt needed to be taken from him, or whether Jonathan intended to behave.[37] Based on Jonathan's assurance that he intended to behave, Jackson permitted Jonathan to keep the belt when he was confined in the Seclusion Room.[38]

While Jonathan was confined in the Seclusion Room, Trotter remained outside. Trotter was seated and "did not continuously visually observe Jonathan in the time-out room." (App. 37a). "It was almost impossible to see into the room that day through the extremely small window in the door."[39] Initially Jonathan was swearing and hitting the door, and at times conversed with Trotter. After fifteen minutes had passed, Trotter for the first time looked in the observation window and was partially able to see

---

[35] *See* n.27, *supra*.

[36] Trotter's previous work experience was as a self-employed wholesale diamond dealer. Trotter Dep. at 3.

[37] Trotter Affidavit, par. 10.

[38] Trotter Affidavit, par. 10.

[39] Trotter Affidavit, par. 12.

Jonathan. After that, Trotter stated, Jonathan quieted down, and another twelve minutes passed.[40] Trotter finally looked through the observation window again, and noted that Jonathan appeared to be sitting on the floor with his back to the door. Trotter pushed open the door and discovered that Jonathan had hanged himself with the macramé belt, having attached the belt to the metal grate over the observation window. (App. 7a, 38a).

On December 2, 2004, seventeen days after Jonathan's death, a number of important safeguards were imposed by the school on the use of the Seclusion Room.[41] Most significantly, the school once again required continuous monitoring of any student while in the room.[42]

---

[40] The Seclusion Room logs actually indicate that Jonathan was in the Room for a longer period.

[41] Stover Dep. Ex. 17.

[42] *Id.*:

> The seclusion room will be continuously monitored by a staff member at all times while in use.... The seclusion room monitor will stand outside the seclusion room ... and continuously observe the student in the room through viewing panels.... In the event that a seclusion room monitor must be relieved or replaced, the replacement monitor must be physically on duty ... observing the student before the first monitor leaves his/her post.

(2) Proceedings Below

Jonathan's parents, Donald and Tina King, filed this action in Georgia state courts, alleging inter alia that Pioneer had violated the constitutional rights guaranteed to Jonathan by the Fourth and Fourteenth Amendments to the Constitution. The complaint stated a cause of action under 42 U.S.C. § 1983, and asserted that Pioneer had brought about that constitutional violation because it maintained insufficient policies, procedures and training to protect students at the school from harm, including suicide.[43]

The gravamen of the plaintiffs' claim was that Pioneer, as a governmental agency, had a "special relationship" with and thus a duty to protect Jonathan both because he was physically confined at the time of his death, and because by confining Jonathan in the Seclusion Room Pioneer had created the danger that the conditions in the Room would

---

[43] The complaint alleged that the actions of Pioneer "caused a denial and deprivation of the rights, privileges and immunities secured to Jonathan under the Constitution ... of the United States, including but not limited to the Fourth and Fourteenth Amendments to the U.S. Constitution." (Complaint for Wrongful Death and Other Damages, paragraphs 32, 33, 34.) The plaintiffs asserted that Pioneer was legally responsible for that constitutional deprivation because the defendant had failed to develop and implement adequate policies, procedures, and training to prevent suicide by a student, which amounted to a "conscious or deliberate indifference to, and deprivation of" those constitutional rights. (*Id.* at paragraphs 30 and 31.).

provoke Jonathan into committing suicide. That contention raised issues (not resolved by the Georgia Court of Appeals) regarding *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989). Where such a duty exists, a constitutional violation would occur if a defendant was aware both of a prisoner or confined student's "suicidal tendencies and the feasibility of suicide in the context of the ... surroundings," to a degree indicating a strong likelihood of suicide. (App. 15a)(quoting *Gish v. Thomas*, 516 F.3d 952, 954-55 (11th Cir. 2008).

The legal issue decided by the Georgia Court of Appeals, and presented by the instant petition, arises in this case because no single official at the Alpine school had all the information relevant to the danger that was created when Jonathan was locked in the Seclusion Room with the rope belt that he used to take his life. One group of Pioneer officials (Arthur, Henning, Baghose, Stover, and Adams) had some personal knowledge of or reports about Jonathan's suicidal threats and gesture, but did not know that he was being confined in the Seclusion Room with the rope. Two other officials (Jackson and Trotter) knew about the confinement, but had not been informed by their colleagues about the suicide threats and gesture.

Pioneer moved for summary judgment on a number of distinct grounds. Most importantly (because this later became the basis of the Georgia Court of Appeals' decision), Pioneer argued that the failure of school staff to warn Trotter and Jackson of

Jonathan's suicide's threats not only immunized Trotter and Jackson from liability, but also insulated the school itself from suit. That conclusion, Pioneer insisted, was compelled by this Court's decision in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986).

> Plaintiffs make much out of the fact that neither Jackson nor Trotter was aware of the incidents in the seclusion room weeks before when Jonathan "threatened" suicide, as Plaintiffs put it. That is precisely the point; neither individual had "subjective knowledge" of a "strong likelihood" that Jonathan might commit suicide.... Therefore, well-established case law would preclude this Court from finding that either employee, had they been named as defendants, committed a violation of Jonathan's constitutional rights when they decided to put him in the time-out room without removing the macramé belt. And, where no individual employee committed a constitutional violation, the predicate for *Monell* [*v. New York City Dept. of Social Services*, 436 U.S. 658 (1978)] liability has not been established. *City of Los Angeles v. Heller*, 475 U.S. 796 (1986)(in the absence of a deprivation of a constitutional right by an individual state officer, no liability on the part of the governmental entity employing that officer.)

(Reply Brief of Defendants Pioneer Regional Education Service Agency, et al., at 14-15)(footnotes omitted).

The Georgia trial court granted summary judgment on other grounds. The trial court concluded that Pioneer had no constitutional duty under *DeShaney* to protect Jonathan from harm (regardless of how foreseeable), reasoning that Jonathan's situation while confined in the Seclusion Room was more analogous to the position of an ordinary public school student (to whom local government's generally have no such duty) than to the position of a prison inmate or person committed to a state mental institution. (App. 35a-36a, 40a-41a).

On appeal, Pioneer again insisted that the fact that Jackson and Trotter were unaware of Jonathan's prior suicide threats insulated the Pioneer itself from liability for Jonathan's death.

> Even if Jonathan had been a suicide risk on November 15, 2004, the evidence still does not demonstrate that the only two employees involved in putting Jonathan in the time-out room ... committed a constitutional violation, that is, acted with deliberate indifference. Plaintiffs make much out of the fact that neither Jackson nor Trotter was aware of the incidents in the time-out room weeks before when Jonathan "threatened" suicide, as Plaintiffs put it. That is precisely the point; no individual employee had "subjective knowledge" of a "strong likelihood" that Jonathan might commit suicide.

(Brief of Appellees Pioneer Regional Educational Service Agency, et al., at 19). Pioneer argued that

under this Court's decision in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), Pioneer itself could not be held liable unless Jackson or Trotter had personally violated the Constitution.

> [W]here no individual employee committed a constitutional violation, the predicate for *Monell* liability has not been established. *City of Los Angeles v. Heller*, 475 U.S. 796 (1986)(in the absence of a deprivation of a constitutional right by an individual state officer, no liability on the part of the governmental entity employing that officer).

(*Id.*). "[I]n order to establish *Monell* liability, there must be a predicate constitutional violation by an individual state actor." (Response to Motion for Reconsideration on Behalf of Appellee Pioneer RESA, at 2-3).

The Georgia Court of Appeals resolved the case under *Heller*. The appellate court did not decide whether under *DeShaney* Pioneer had a special relationship with Jonathan, and thus was under a constitutional duty to protect him. Regardless of whether such a constitutional duty existed, the Court of Appeals held, the plaintiffs' claim was barred by the fact that Jackson and Trotter had no idea that Jonathan had repeatedly threatened to kill himself.

> [E]ven if we accept the premise that sending Jonathan to the time-out room created a situation that was more analogous to that of an incarcerated inmate than to a middle-school student, ... there is no evidence that

> the two Alpine employees who were responsible for putting Jonathan in the time-out room (Trotter and Jackson) on the day that he committed suicide acted with deliberate indifference. Both Trotter ... and Jackson testified that they were not made aware by other staff that Jonathan had ever threatened to harm himself.

(App. 14a-15a). The Court of Appeals reasoned that the plaintiffs' theory of the liability – that Pioneer caused a violation of Jonathan's constitutional rights by failing to warn Trotter and Jackson – was actually a conclusive defense.

> [T]he Kings acknowledge that neither Jackson nor Trotter had been made aware of the alleged suicidal threats that Jonathan had made while confined to the time-out room a few weeks prior to his death. Thus, in sending Jonathan to the time-out room, neither Trotter nor Jackson deliberately disregarded a strong likelihood that Jonathan would harm himself.... Accordingly, ... the Kings have not demonstrated that the two school officials actually responsible for that confinement deprived Jonathan of his substantive due process rights.

(App. 15a-16a).

The Kings, of course, had not sued Trotter and Jackson. Turning to the claim against the named defendant, Pioneer, the Court of Appeals accepted the defendant's argument that under *Heller* the plaintiffs could not sue Pioneer itself if Trotter and Jackson

(because of their ignorance) had not personally violated Jonathan's constitutional rights.

> The Kings also contend that Pioneer['s] ... conduct, policies, and employee training procedures demonstrated deliberate indifference to its duty to protect Jonathan from harming himself. This contention is without merit. As discussed [earlier], the Kings have failed to show that Jonathan was deprived of his right to substantive due process by any school officials. Without an underlying violation of Jonathan's constitutional rights, Pioneer ... cannot be liable on the ground that its conduct, policies, or training procedures caused a constitutional violation. See ... *City of Los Angeles v. Heller*.

(App. 16a).

Plaintiffs moved for reconsideration of the Court of Appeals' decision, arguing that *Heller* applied only in a case in which the alleged constitutional violation had been caused solely by a single government official. Plaintiffs relied on a pre-*Heller* decision in the Eleventh Circuit, which had held that a city could be liable "[a]lthough the acts or omissions of no one employee may violate an individual's constitutional rights," if the plaintiff shows that "the combined acts or omissions of several employees ... violate an individual's constitutional rights." *Anderson v. City of Atlanta*, 778 F.2d 678, 686 (11th Cir. 1985)(quoting *Garcia v. Salt Lake County*, 768 F.2d 303, 310 (10th

Cir. 1985)).[44] Pioneer, however, insisted that "*Anderson* simply can no longer be considered good law, given the United States Supreme Court decision in *City of Los Angeles v. Heller*."[45] The Court of Appeals declined to reconsider its decision.

Plaintiffs filed a timely petition for certiorari with the Supreme Court of Georgia. Plaintiffs again argued that the appellate court had erred in holding that under *Heller* Pioneer could not be held liable without a showing of individual liability on the part of Trotter and Jackson. Plaintiffs asserted that the decision of the Georgia Court of Appeals conflicted with decisions of federal courts of appeals for the Second, Eighth, Ninth and Eleventh Circuits.[46] On April 19, 2010, the Supreme Court of Georgia denied the petition. (App. 43a).

On July 8, 2010, the Georgia State Board of Education adopted a Rule forbidding the use of seclusion rooms in any public school or educational program in the state.[47] The state acted in the wake of

---

[44] Motion for Reconsideration, at 5-9 ("the apposite Eleventh Circuit case that *does* directly address whether an entity employee must have acted with deliberate indifference before his entity employer may be found liable under § 1983 ... is *Anderson v. City of Atlanta*")(emphasis in original).

[45] Response to Motion for Reconsideration, at 2.

[46] Petition for Writ of Certiorari, at 13-19.

[47] Rule 160-5-1-.35 provides in section 2(a), "The use of seclusion is prohibited in Georgia public schools and educational programs." Seclusion is defined in section (1)(e) as follows:

(Continued on following page)

congressional hearings on problems with state seclusion practices, and of a 2009 report to Congress by the General Accounting Office regarding the use of seclusion rooms in state schools. The GAO report specifically referred to the death of Jonathan while confined at the Alpine school.[48]

> Seclusion occurs in a specifically constructed or designated room or space that is physically isolated from common areas and from which the student is physically prevented from leaving. Seclusion may also be referred to as monitored seclusion, seclusion timeout, or isolated timeout.

[48] General Accounting Office, Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers, Testimony Before the Committee on Education and Labor, House of Representatives, May 19, 2009, at unnumbered first page ("GAO did find hundreds of cases of alleged abuse and death related to the use of these methods on school children during the past two decades. Examples of these cases include ... a 13 year old reportedly hanging himself in a seclusion room...."), 5("Other examples of death and abuse claims are as follows.... A 13 year-old boy with attention deficit hyperactivity disorder at an alternative public school hung himself in a seclusion room weeks after threatening to commit suicide, using a cord a teacher reportedly provided him to hold up his pants").

REASONS FOR GRANTING THE WRIT

I. THERE IS AN IMPORTANT CONFLICT AMONG THE LOWER COURTS REGARDING THE INTER-RELATIONSHIP OF INDIVIDUAL AND GOVERNMENT LIABILITY FOR CONSTITUTIONAL VIOLATIONS

This case presents a longstanding dispute, and inter-circuit conflict, regarding the relationship between the liability of individual officials and the liability of local government bodies for asserted constitutional violations. That dispute and conflict concern this Court's decision in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986).

In *Heller* the plaintiff alleged that a police officer had used excessive force in arresting him. The plaintiff sued both the arresting officer and the city for which he worked. After a jury had returned a verdict for the defendant officer, the city moved for dismissal of the remaining claim against the city itself. This Court held that dismissal of that claim was required; regardless of whether the city might have authorized the use of excessive and unconstitutional force, the jury verdict constituted a determination that the officer in question had not used such force against the plaintiff.

> [N]either *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), nor any other of our cases, authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the

> officer inflicted no constitutional harm. If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.

475 U.S. at 800 (emphasis in original).

Heller was an easy case, because the constitutional violation alleged – the use of excessive force that assertedly caused Heller to fall through a plate glass window – was literally at the hands of a single police officer. If the officer who had struggled with Heller had not used an unconstitutional level of force, there was necessarily no constitutional violation at all.

But, as this Court has noted, there are other constitutional claims which – unlike *Heller* – arise from the interrelated actions of several officials, no one of whom by himself may have violated the constitution. These claims present "'systemic' injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith." *Owen v. City of Independence, Mo.*, 445 U.S. 622, 652 (1980). The lower courts are sharply divided as to whether under *Heller* a local government body can only be liable if some individual

government official personally violated the constitution.[49]

(1) Several circuits and a number of state courts adhere to the interpretation of *Heller* successfully advanced by the defendant in this case, holding that a city or other local government body can only be held liable if some individual government official personally violated the Constitution.

The Fourth Circuit, for example, holds that a local government unit's "§ 1983 liability is derivative of, but narrower than, the officers.'" *Kopf v. Wing*, 942 F.2d 265, 269 (4th Cir. 1991); *see Crumpe v. Bowman*, 1995 WL 255934 at *2 (4th Cir. 1995)(quoting *Kopf*).

> The § 1983 claim against [the individual defendant] is the gateway to all other § 1983 claims, for ... municipalities cannot be liable under § 1983 without some predicate "constitutional injury at the hands of the individual [state] officer," ... *City of Los Angeles v. Heller* ...

Waybright v. Frederick County, Md., 528 F.3d 199, 203 (4th Cir. 2008); *see Altman v. City of High Point, N.C.*, 330 F.3d 194, 207 n.10 (4th Cir. 2003)("a

---

[49] If an individual official is shown to have violated the Constitution, but avoids liability based on qualified immunity, all courts agree that liability may nonetheless be imposed on the government body for which the individual worked, because government bodies do not enjoy qualified immunity. *International Ground Transp. v. Mayor and City Council of Ocean City, Md.*, 475 F.3d 214, 219 (4th Cir.2007).

municipality cannot be liable in the absence of a constitutional violation by one of its agents. *See City of Los Angeles v. Heller*").

The Sixth Circuit applies its "well-settled rule that a municipality cannot be held liable under § 1983 unless a constitutional violation by its agents is first established.... *City of Los Angeles v. Heller*." *Estate of Harbin v. City of Detroit*, 147 Fed. Appx. 566, 572 (6th Cir. 2005). "A municipality or county cannot be liable under § 1983 absent an underlying constitutional violation by its officers. *City of Los Angeles v. Heller*." *Blackmore v. Kalamazoo County*, 390 F.3d 890, 900 (6th Cir. 2004). "If no constitutional violation by the individual defendants is established, the municipal defendants cannot be held liable under § 1983. *City of Los Angeles v. Heller*." *Watkins v. City of Battle Creek*, 273 F.3d 682, 687 (6th Cir. 2001). "Section 1983 actions against institutions are not sustainable where an employee did not commit an underlying violation. *See City of Los Angeles v. Heller*." *Klemencic v. Ohio State University*, 263 F.3d 504, 511 (6th Cir. 2001).[50]

---

[50] *Hoard v. Sizemore*, 198 F.3d 205, 221 (6th Cir. 1999)("A city or county ... may not be held liable where there has been no constitutional violation by one of the city or county's employees. *See City of Los Angeles v. Heller*"); *Roberts v. Anderson*, 213 Fed. Appx. 420, 427 (6th Cir. 2007)("Because no constitutional violation by the individual defendants was established, the municipal defendants cannot be held liable under § 1983.... *City of Los Angeles v. Heller*"); *Crocker v. County of Macomb*, 119 Fed. Appx. 718, 724 (6th Cir. 2005)("If the plaintiff fails to establish a constitutional violation by an individual officer, the local

(Continued on following page)

The First Circuit has taken a similar approach. "'[A]ny liability that the Town may have under § 1983 is derivative' from the unconstitutional actions of the defendant police officers. [*Flowers v. Fiore*, 239 F.Supp.2d 173,] 178 [(D.R.I. 2003)] (citing *City of Los Angeles v. Heller* ...)"; *see Hayden v. Grayson*, 134 F.3d 449, 456 (1st Cir. 1998)("Normally, ... a municipality cannot be held liable unless its agent actually violated the victim's constitutional rights. *See City of Los Angeles v. Heller*").

The Alabama Supreme Court has adopted the same interpretation of *Heller*.

> In order to hold a government entity liable [under section 1983] for an injury inflicted by an employee or agent of the entity, an individual must demonstrate that he or she suffered "constitutional injury at the hands of the individual [governmental employee or agent.]" *City of Los Angeles v. Heller*....

City of Birmingham v. Major, 9 So.3d 470, 477 (Ala. 2008).

(2) Five circuits have rejected this reading of *Heller*, holding instead that a government body can be liable in a section 1983 action – even in the

---

government unit cannot be held liable ... *City of Los Angeles v. Heller*"); *Whitlow v. City of Louisville*, 39 Fed. Appx. 297, 302 (6th Cir. 2002)("Plaintiff's claims against the city are dependent upon the existence of a constitutional violation by its officers")(citing *Heller*).

absence of a violation by any individual defendant – where the injury complained of was the result of the combined effect of actions of several officials, no one of whom by himself had committed a constitutional violation.

In *Thomas v. Cook County Sheriff's Department*, 604 F.3d 293 (7th Cir. 2009), a pretrial detainee at the county jail had died when medical technicians failed to give him needed medical care. That failure was rooted in defects in the jail's system for providing the medical technicians with information about inmates' medical histories and problems. The Seventh Circuit upheld the verdict against the county, even though a jury had exonerated the individual medical technicians responsible for the inmate prior to his death.

> The County ... appears to push for a rule that requires individual officer liability before a municipality can ever be held liable for damages under *Monell*. This is an unreasonable extension of *Heller*.... The actual rule ... is much narrower: a municipality can be held liable under *Monell*, even when its officers are not, unless such a finding would create an *inconsistent* verdict. *See Heller*, 475 U.S. at 798-99.... So, to determine whether the County's liability is dependent on its officers, we look to the nature of the constitutional violation, the theory of municipal liability, and the defenses set forth.... [T]he jury could have found that the [medical technicians] were not *deliberately indifferent* to [the inmate's] medical needs, but simply could not

> respond adequately because of the well-documented breakdowns in the County's policies for retrieving medical request forms. It is not difficult to reconcile the verdicts in this instance, and we see nothing amiss in holding the County liable even though none of the [medical technicians] were individually liable.

604 F.3d at 305 (emphasis in original).

The Eighth Circuit reached a similar result in *Speer v. City of Wynne, Arkansas*, 276 F.3d 980 (8th Cir. 2002). The plaintiff in *Speer* asserted that he had been denied due process when he was fired without being given an opportunity to contest serious charges that had been made against him. The constitutional claim asserted by Speer required proof of two distinct acts, which could be (and in his case apparently were) taken by separate officials: one dismissing Speer with allegations of serious misconduct, and another denying Speer a subsequent name-clearing hearing. The Eighth Circuit upheld a judgment against the city, even though the trial court had not imposed liability on the Mayor who initially dismissed the plaintiff.

> Relying on *Los Angeles v. Heller*, ... the City suggests that we must reverse because the district court failed to find that Mayor Green was individually liable for a violation of Speer's constitutional rights.... The appropriate question under *Heller* is whether a verdict or decision exonerating the individual government actors can be harmonized with a concomitant verdict or decision imposing

> liability on the municipal entity. The outcome of the inquiry depends on the nature of the constitutional violation alleged, the theory of municipal liability asserted by the plaintiff, and the defenses set forth by the individual actors.... [S]ituations may arise where the combined actions of multiple officials or employees may give rise to a constitutional violation, supporting municipal liability, but where no one individual's actions are sufficient to establish liability for the violation.

276 F.3d at 985-86; *see Parrish v. Luckie*, 963 F.2d 201, 207 (8th Cir. 1992)("A public entity ... may be liable under § 1983 even though no government individuals were personally liable.").

In *Barrett v. Orange County Human Rights Comm'n*, 194 F.3d 341 (2d Cir. 1999), the Second Circuit agreed with the "circuits [that] have recognized that a municipality may be found liable under § 1983 even in the absence of individual liability." 194 F.3d at 350 (quoting *Anderson v. City of Atlanta* and *Garcia v. Salt Lake County*).

> These courts conclude that even in situations where the acts or omissions of individual employees do not violate an individual's constitutional rights, "the combined acts or omissions of several employees acting under a governmental policy or custom may violate" those rights. [*Garcia*, 768 F.2d at 310].... We agree with our sister circuits that

> under *Monell* municipal liability for constitutional injuries may be found to exist even in the absence of individual liability, at least so long as the injuries complained of are not solely attributable to the actions of named defendants. *Cf. City of Los Angeles v. Heller.*

Id.; *see Rutigliano v. City of New York*, 326 Fed. Appx. 5, 9 (2d Cir. 2009)(rule in *Barrett* applies where "the combined acts or omissions of several employees acting under a governmental policy or custom ... violate [constitutional] rights"); *Curley v. Village of Suffern*, 268 F.3d 65, 71 (2d Cir. 2001)(*Heller* inapplicable "where alleged injuries are not solely attributable to the actions of named individual defendants"); *Dodd v. City of Norwich*, 827 F.2d 1, 4-5 (2d Cir. 1987)("As to the § 1983 claim against the city, the district court dismissed because of its erroneous view that the city would be liable only if [the plaintiff's] constitutional rights had been violated by [the police officer]. There is no such requirement in the law.").

The Ninth Circuit has repeatedly held that a city or county may be held liable in an action under section 1983 even though no individual official had committed a constitutional violation.

> The municipal defendants ... assert that, if we conclude ... that the individual defendants were not liable for violating Gibson's constitutional rights, then they are absolved of liability. Although there are certainly circumstances in which this proposition is correct, ... it has been rejected as an inflexible

> requirement by both this court and the Supreme Court.... [A] municipality may be liable even if liability cannot be ascribed to a single individual officer. *Owen v. City of Independence*, 445 U.S. 622, 652 (1980).

Gibson v. County of Washoe, Nev., 290 F.3d 1175, 1186 n.7 (9th Cir. 2002); *see Fairley v. Luman*, 281 F.3d 913, 917 (9th Cir. 2002)(city can be liable despite exoneration of individual defendants where the "alleged constitutional deprivations were not suffered as a result of actions of the individual officers, but as a result of the collective inaction of the ... Department"); *Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir. 1992)("city might be held liable for improper training ... even if [the police officer] is exonerated, since [the city] put an officer on the street who is so badly trained and instructed he lets his baton be taken away from him and then has to kill an unarmed civilian to save his own life").

The Third Circuit holds that a city may be liable in a section 1983 action, particularly one involving (as in the instant case) a denial of substantive due process, even though no individual official has committed a constitutional violation.

> A finding of municipal liability does not depend automatically or necessarily on the liability of any police officer.... If we conditioned municipal liability on an individual police officer's liability in every case, it might lead to illogical results.... It is easy to imagine a situation where an improperly trained

> police officer may be ignorant of the danger created by his actions and inflicts injury. Meanwhile, the city's policy makers, with a wealth of information available to them, are fully aware of those dangers but deliberately refuse to require proper training. The officer may escape liability because his conduct did not "shock the conscience." It does not follow, however, that the city should also escape liability.

Fagan v. City of Vineland, 22 F.3d 1283, 1292 (3d Cir. 1994); *see Brown v. Commonwealth of Pennsylvania Dept. of Health, etc.*, 318 F.3d 473, 482 (3d Cir. 2003)("It is possible for a municipality to be held independently liable for a substantive due process violation even in situations where none of its employees are liable.") In *Grazier v. City of Philadelphia*, 328 F.3d 120 (3d Cir. 2003), the Third Circuit reaffirmed the applicability of *Fagan* to substantive due process claims, while holding that *Heller* would apply to excessive force claims. 328 F.3d at 124 n.5 (Opinion joined by Alito, J.).

The Tenth and Eleventh Circuits have also held that a government body may be held liable even though no individual official committed a constitutional violation.

> *Monell* does not require that a jury find an individual defendant liable before it can find a local governmental body liable.... Although the acts or omissions of no one employee may violate an individual's constitutional rights, the combined acts or omissions of several

> employees acting under a governmental policy or custom may violate an individual's constitutional rights.

Garcia v. Salt Lake County, 768 F.2d 303, 310 (10th Cir. 1985).

> The district court stated that there could be no municipal liability in this case because the jury absolved all the individual officers having contact with Mr. Anderson. However, ... *Monell* ... and its progeny do not require that a jury must first find an individual defendant liable before imposing liability on local government.

Anderson v. City of Atlanta, 778 F.2d 678, 686 (11th Cir. 1985)(quoting *Garcia*). Although *Garcia* and *Anderson* were decided prior to *Heller*, they remain the controlling precedents in the Tenth and Eleventh Circuits, respectively.

(3) The conflict among these decisions is well recognized.

In *Fagan* the Third circuit expressly "declined to follow four other courts of appeals, which have suggested that a municipality can be liable for a failure to train only if one of the pursuing police officers violated the Constitution." 22 F.3d at 1293.

Several subsequent decisions in other courts have disapproved of the holding in *Fagan*. "[W]e believe that the *Fagan* panel improperly applied the Supreme Court's teachings." *Evans v. Avery*, 100 F.3d 1033, 1039-40 (1st Cir. 1996). "[W]e ... declin[e] to

follow *Fagan*." *Hildebrandt v. City of Fairbanks*, 957 P.2d 974, 977 (Alaska 1998). "[W]e reject [*Fagan*] as inconsistent with the pronouncements of the Supreme Court, particularly *Heller*." *Robbins v. Cumberland County Children and Youth Services*, 802 A.2d 1239, 1250 (Pa. 2002).

The Third Circuit noted that

> there is a split among the courts of appeals on this issue. Some courts have explicitly rejected our holding in *Fagan*.... but other courts have agreed with our opinion.... *See Fairley v. Luman*, 281 F.3d 913, [917 n.4] (9th Cir. 2002).

Brown v. Commonwealth of Pennsylvania Dept. of Health, etc., 318 F.3d 473, 482 n.3 (3d Cir. 2003).

II. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE CONFLICT

This case presents precisely the type of situation in which the dispute about the meaning of *Heller* is controlling. In the instant case, because of the Alpine school's practices regarding the sharing of information about Jonathan's suicide threat, no single official could be said to have violated his constitutional rights. As the defendant argued, and the Georgia Court of Appeals held, Trotter and Jackson were not liable because they were never told about the suicide threats. The various officials who knew about the threats, of course, were not present when Trotter and

Jackson decided to let Jonathan keep his rope belt while confined, unobserved, in the Seclusion Room. The officials who had put in place the new dangerously lax Seclusion Room policies in effect when Jonathan died – dispensing with the prior requirement of continuous observation – knew none of this when they adopted that policy.

The Georgia Court of Appeals exonerated Pioneer from liability – just as Pioneer itself had urged – on the theory that these practices, by protecting any individual official from liability, meant under *Heller* that Pioneer itself could not be held liable.

The circumstances of this case present precisely the sort of situation in which the Second, Third, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits would allow a claim against Pioneer to proceed despite the fact that no single official individually violated Jonathan's constitutional rights. This is a quintessential example of a case in which "the combined actions of multiple officials" gave rise to a constitutional violation, even though "no one individual's actions are sufficient to establish liability for the violation." *Speer v. City of Wynne, Arkansas*, 276 F.3d at 985-86.

III. THE DECISION OF THE GEORGIA COURT OF APPEALS IS CLEARLY INCORRECT

As a majority of the federal courts of appeals have recognized, *Heller* is not a construction of section 1983 creating some special liability limitation

for local government bodies. Nor is *Heller* a decision regarding substantive constitutional law. Rather, *Heller* merely directs the lower courts to examine the basis of claims against individual officials and government bodies, to ascertain whether in the circumstances of a particular case a finding of liability on the part of the government would be consistent with a finding that particular individual officials themselves had not violated the constitution.

This Court's decision in *Owen* makes clear that there is an important category of constitutional claims in which the underlying violation is a result of "the interactive behavior of several government officials," even though the conduct of "any single individual" did not by itself violate the Constitution. 455 U.S. at 652. The interpretation of *Heller* successfully advanced by Pioneer in the courts below precludes relief for this entire category of cases. As experience in the lower courts illustrates, the type of constitutional violation described in *Owen* can occur in a wide variety of circumstances involving a range of constitutional claims.

The decision below creates a perverse incentive for local government bodies to immunize themselves from liability by so dispersing knowledge and responsibility among their officials that no single individual has a full understanding of what is occurring. Doing so turns "Don't ask, don't tell" into a conclusive defense to otherwise meritorious constitutional claims. As the tragic facts of this case demonstrate all

too well, that sort of stratagem materially increases the danger that constitutional violations will indeed occur.

CONCLUSION

For the above reasons, this Court should grant a writ of certiorari to review the judgment and opinion of the Georgia Court of Appeals, Third Division.

Respectfully submitted,

ERIC SCHNAPPER*
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@u.washington.edu

E. WYCLIFFE ORR, SR.
SPENCE JOHNSON
DUSTIN MARLOWE
ORR BROWN JOHNSON LLP
P.O. Box 2944
Gainesville, GA 30505
(770) 534-1980

Attorneys for Petitioners

**Counsel of Record*

Court of Appeals of Georgia.
KING et al.
v.
PIONEER REGIONAL EDUCATIONAL SERVICE AGENCY et al.
No. A09A1567.

Nov. 5, 2009.
Reconsideration Denied Dec. 10, 2009.
Certiorari Denied April 19, 2010.

BLACKBURN, Presiding Judge.

While attending the Alpine Psychoeducational Program ("Alpine"), which is a school for students with severe emotional behavior disorders, Jonathan King committed suicide. Pursuant to 42 U.S.C. § 1983, his parents, Donald and Tina King, sued Pioneer Regional Educational Service Agency ("Pioneer RESA"), which acts as a local school system in managing Alpine, alleging that Pioneer RESA violated their son's substantive due process rights under the Fourteenth Amendment of the United States Constitution. The Kings also sued the Georgia Department of Education ("DOE"), claiming that DOE was liable for Jonathan's death by failing to fulfill a duty under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., to regulate Alpine's disciplinary procedures. Following the grant of both Pioneer RESA's motion for summary judgment and DOE's motion to dismiss, the Kings appeal, arguing that questions of material fact remain as to whether Pioneer RESA violated Jonathan's substantive due

process rights and further arguing that their claims against DOE were not barred by sovereign immunity.

As to the Kings' contention that the trial court erred in granting Pioneer RESA's motion for summary judgment, we find that the Kings have not met the requirements of § 1983 in that they have not shown that the Alpine staff members were deliberately indifferent to Jonathan harming himself. Thus, the Kings have not demonstrated that Jonathan's suicide was caused by a violation of his substantive due process rights, and their § 1983 claims necessarily fail. Accordingly, we affirm the trial court's grant of summary judgment to Pioneer RESA.

As to the Kings' contention that the trial court erred in granting DOE's motion to dismiss, we find that the IDEA does not impose a duty upon DOE that would give rise to a tort claim and that the Kings have failed to show that DOE waived its sovereign immunity with regard to any other claims. Accordingly, we affirm the trial court's grant of DOE's motion to dismiss.

Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. OCGA § 9-11-56(c); *Britt v. Kelly & Picerne, Inc.*[1] "On appeal from the grant or denial of a motion for summary

---

[1] *Britt v. Kelly & Picerne, Inc.*, 258 Ga.App. 843, 575 S.E.2d 732 (2002).

judgment, we review the evidence de novo, and all reasonable conclusions and inferences drawn from the evidence are construed in the light most favorable to the nonmovant." *McCaskill v. Carillo.*[2]

So construed, the evidence shows that Pioneer RESA is part of a statewide network of regional educational service agencies that were established to provide various shared services to local school systems. *See* OCGA § 20-2-270(a). In essence, Pioneer RESA acts as the equivalent of a local school district and has administrative responsibilities, including those of fiscal agent, for the schools within its designated geographical area. *See* OCGA § 20-2-270(b) and (c); *North Ga. Regional Educational Svc. Agency v. Weaver.*[3] One of the schools for which Pioneer RESA is administratively responsible is Alpine, which is part of the Georgia Psychoeducational Network and which provides educational services for students with severe emotional behavior disorders. *See* OCGA § 20-2-270.1(c). DOE is responsible for ensuring that Alpine is in compliance with the IDEA and other statutes for funding purposes, but it does not manage the school's day-to-day operations, as such is the responsibility of the local school systems. *See* Ga. Const. of 1983, Art. VIII, Sec. V, Par. II.

---

[2] *McCaskill v. Carillo,* 263 Ga.App. 890, 589 S.E.2d 582 (2003).

[3] *North Ga. Regional Educational Svc. Agency v. Weaver,* 272 Ga. 289, 291, 527 S.E.2d 864 (2000).

In order to manage the behavioral issues endemic to many of the students who attend Alpine, the school uses a variety of intervention strategies, including talking with students, deducting behavior points, separating misbehaving students from other students by moving them to another part of the classroom, and sending a misbehaving student to what is known as a time-out room. The time-out room at Alpine is an approximately eight-foot-by-eight-foot room without furniture and with only one entrance. The door to the room can be locked from the outside and has a small glass window, which is protected by a metal grate. Students are sent to the time-out room when all other intervention strategies have failed or when the student's behavior poses immediate physical harm to himself or others. Alpine's procedures regarding use of time-out rooms required that a staff member remain just outside the door for the entire time that a student is in the time-out room to monitor the student. The procedures also required the monitor to visually check on the student every 15 minutes and to document the student's behavior on a time-out log, which was created for that purpose. Before sending a student to the time-out room, the monitor was required to take from the student any items that could be used to injure himself or to damage the room.

Jonathan King first enrolled at Alpine in the fall of 2002, at the age of eleven, and over the next two years, he attended the school intermittently during periods when he was not attending the local public

school. Jonathan was enrolled at Alpine based on emotional and behavioral issues and had been diagnosed with ADHD at a young age. On several occasions during his enrollment at Alpine, he had made suicidal comments to a few of the school's staff members. However, when pursuant to school policy Alpine's school psychologist tried to discuss these threats with Jonathan, he would respond that he was only kidding and that he did not have a true intent to commit suicide. In addition, Jonathan's mother was aware of his suicidal comments but believed that he made these threats to harm himself as a means to manipulate her.

In late September 2004, Jonathan's parents caught him huffing gasoline. As part of his juvenile probation, he was admitted to a psychiatric hospital for evaluation and treatment for *inhalant abuse*. After approximately two weeks, he was discharged to resume his enrollment at Alpine. The hospital's discharge summary stated that Jonathan denied feeling suicidal and indicated that he could be safely discharged. A few weeks after he had resumed attending school, Jonathan became disruptive on a day that Alpine was conducting school-wide standardized testing and refused to participate in the testing. Because the testing was being conducted in nearly all of the school's available space, Jonathan spent the greater part of the next two days in the time-out room while the testing was ongoing. On both days, he made suicidal threats while in the time-out room, which were recorded by staff on the time-out logs and which

were reported to his mother when she picked him up at the end of the day.

On November 15, 2004, Jonathan came to school in the morning wearing pants that were too loose around his waist. Because he did not have a belt with him, Jonathan asked his teacher if he could go to the classroom next door to ask Doug Jackson, a paraprofessional who had worked with Jonathan the previous year, if he had anything that could be used as a makeshift belt. His teacher agreed, and Jackson gave Jonathan a length of macrame from the classroom's art supplies to use as a belt. Later that morning, Jonathan and some other students were being disruptive while eating breakfast in the cafeteria. Consequently, his teacher asked substitute paraprofessional Kenneth Trotter to take Jonathan and the other students back to the classroom. Shortly after they returned, Jonathan began picking a fight with one of the other students. Despite Trotter's reprimands, Jonathan continued taunting the other student and eventually climbed over his study carrel in an attempt to attack him. After physically restraining Jonathan, Trotter took him into the hallway and asked Jackson to assist him in taking Jonathan to the time-out room.

Upon entering the time-out room, Jonathan removed his shoes and tossed them into the hallway. Jackson then asked him if his macrame belt was going to be a problem, and Jonathan responded that it would not. Thereafter, Jackson returned to his classroom and Trotter began to monitor Jonathan's

behavior in the time-out room through the window on the door. During the first 15 minutes, Jonathan cursed, asked to be let out, and repeatedly hit the door. A few minutes later, he became quiet, and thus Trotter decided to let him out of the room. However, as Trotter started to push the door open, he realized that all of Jonathan's weight was leaning against it. After quickly forcing the door open, Trotter discovered that Jonathan was unconscious, having hanged himself from the metal grate on the door's window with his macrame belt. Trotter immediately called for help, and within seconds a teacher arrived and began administering CPR. EMTs arrived several minutes later, but they were unable to revive Jonathan, and he was pronounced dead at the hospital.

Subsequently, Donald and Tina King, as Jonathan's parents, filed a wrongful death action against Pioneer RESA, Alpine,[4] and DOE. In their complaint, they alleged that, pursuant to 42 U.S.C. § 1983, Pioneer RESA deprived Jonathan of his substantive due process rights under the Fourteenth Amendment to the United States Constitution by failing to implement adequate policies and training regarding the use of the time-out rooms and prevention of suicide. The Kings also alleged that DOE was liable for their son's death under the Georgia Tort Claims Act, OCGA § 50-21-20 et seq., by failing to implement policies

---

[4] The trial court later dismissed Alpine, and the Kings do not appeal that ruling.

governing the use of time-out rooms despite a duty to do so.[5]

Thereafter, DOE moved to dismiss the Kings' claims against it on the ground that it had not waived sovereign immunity as to those claims.[6] The trial court granted DOE's motion to dismiss, and denied the Kings' motion for reconsideration of the issue, but also denied DOE's request for final judgment, reasoning that piecemeal appellate review could possibly be avoided if final judgment were granted to DOE after the disposition of Pioneer RESA's soon-to-be-filed motion for summary judgment. After discovery, Pioneer RESA filed a motion for summary judgment as to the Kings' § 1983 claims against it, which the trial court granted. The Kings now appeal both the grant of Pioneer RESA's motion for summary judgment and the grant of DOE's motion to dismiss.

---

[5] DOE was not sued under 42 U.S.C. § 1983 because neither the State nor its agencies are considered persons against whom a § 1983 claim for damages will lie. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65-66, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989).

[6] Because Pioneer RESA is considered a local governmental entity, it is precluded from asserting sovereign immunity as a defense to a § 1983 claim. *See Owen v. City of Independence*, 445 U.S. 622, 647-648(III)(A), 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) ("By including municipalities within the class of 'persons' subject to liability for violations of the Federal Constitution and laws, Congress – the supreme sovereign on matters of federal law – abolished whatever vestige of the State's sovereign immunity the municipality possessed.").

1. The Kings contend that the trial court erred in granting summary judgment to Pioneer RESA as to their § 1983 claims. Specifically, they argue that questions of material fact remain as to whether Pioneer RESA had an affirmative duty, under the due process clause of the Fourteenth Amendment, to prevent Jonathan from harming himself and that such questions also remain as to whether Pioneer RESA's conduct, policies, and employee training procedures demonstrated a deliberate indifference to that duty. We disagree.

In order to state a claim against Pioneer RESA under 42 U.S.C. § 1983, the Kings must allege that a Pioneer RESA policymaker's acts or omissions, done under color of state law, resulted in the deprivation of a right, privilege, or immunity protected by the United States Constitution or the laws of the United States. *Brown v. Dorsey.*[7] Put simply, a "plaintiff must show a deprivation of a federal right by a person acting under color of state law." (Punctuation omitted.) *Id.* In *Monell v. Dept. of Social Svcs. etc.*,[8] the United States Supreme Court held that municipalities and other local governmental entities are included among those persons to whom § 1983 applies. However, in that same decision, the Court also held that a local governmental entity may not be held

---

[7] *Brown v. Dorsey*, 276 Ga.App. 851, 853, 625 S.E.2d 16 (2005).

[8] *Monell v. Dept. of Social Svcs. etc.*, 436 U.S. 658, 690(II), 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

liable on a respondeat superior theory, stating that "[i]nstead, it is when execution of a government's policy or custom . . . inflicts the injury that the government as an entity is responsible under § 1983." *Monell, supra*, 436 U.S. at 694(II), 98 S.Ct. 2018. *See Bd. of the County Commrs., etc. v. Brown.*[9] The Supreme Court has further held that a "proper analysis requires [a court] to separate two different issues when a § 1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the [municipality] is responsible for that violation." *Collins v. City of Harker Heights.*[10] With this background in mind, we first address whether Jonathan's suicide was caused by a violation of his Fourteenth Amendment right to substantive due process. *See Rooney v. Watson*[11] ("an inquiry into a governmental entity's custom or policy is relevant only when a constitutional deprivation has occurred").

(a) *Jonathan's suicide was not caused by a deprivation of his substantive due process rights.* The Kings contend that Pioneer RESA had an affirmative duty, under the due process clause of the Fourteenth Amendment, to prevent Jonathan's suicide. "[T]he Due Process Clause was intended to prevent government

---

[9] *Bd. of the County Commrs., etc. v. Brown*, 520 U.S. 397, 403(II), 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997).

[10] *Collins v. City of Harker Heights*, 503 U.S. 115, 120(I), 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992).

[11] *Rooney v. Watson*, 101 F.3d 1378, 1381(II) (11th Cir.1996).

officials from abusing their power, or employing it as an instrument of oppression." (Punctuation omitted.) *County of Sacramento v. Lewis.*[12] "The substantive component of the Due Process Clause protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them." (Punctuation omitted.) *Davis v. Carter.*[13] *See Collins, supra*, 503 U.S. at 125(III), 112 S.Ct. 1061. However, "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." *DeShaney v. Winnebago County Dept. of Social Svcs.*[14]

In *DeShaney,* the Supreme Court "rejected the argument that a constitutional duty of protection can arise from a state's special relationship with a particular individual where the state played no part in creating the danger posed to the individual." (Punctuation omitted.) *Davis, supra*, 555 F.3d at 982(II). Specifically, the Court held that

---

[12] *County of Sacramento v. Lewis,* 523 U.S. 833, 846(II)(B), 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998).

[13] *Davis v. Carter,* 555 F.3d 979, 981(II) (11th Cir.2009).

[14] *DeShaney v. Winnebago County Dept. of Social Svcs.,* 489 U.S. 189, 195(II), 109 S.Ct. 998, 103 L.Ed.2d 249 (1989).

> [i]n the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty against harms inflicted by other means.

DeShaney, supra, 489 U.S. at 200(II), 109 S.Ct. 998. *See City of Revere v. Massachusetts Gen. Hosp.*[15] (applying substantive due process duty to protect to pre-trial detainees); *Youngberg v. Romeo*[16] (applying substantive due process duty to protect involuntarily-committed mental patients). Applying this analysis, the Eleventh Circuit Court of Appeals has found that, unlike incarceration or involuntary institutionalization, "[c]ompulsory school attendance laws alone are not a restraint of personal liberty sufficient to give rise to an affirmative duty of protection." (Punctuation omitted.) *Wyke v. Polk County School Bd.*[17] *See Vernonia School Dist. 47J v. Acton.*[18] In *Wyke,* the Eleventh Circuit held that

---

[15] *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244(III)(B), 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983).

[16] *Youngberg v. Romeo*, 457 U.S. 307, 315-316(II)(A), 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982).

[17] *Wyke v. Polk County School Bd.*, 129 F.3d 560, 569(III)(A) (11th Cir.1997).

> [b]y mandating school attendance, the state simply does not restrict a student's liberty in the same sense that it does when it incarcerates prisoners or when it commits mental patients involuntarily. Absent that type of restraint, there can be no concomitant duty to provide for the student's safety and general well-being.

(Punctuation omitted.) *Wyke, supra*, 129 F.3d at 569(III)(A). *See Murphy v. Bajjani.*[19] Other circuits have similarly rejected the argument that compulsory school attendance saddles school authorities with a duty to protect students from private harms. *See Hasenfus v. LaJeunesse;*[20] *Armijo v. Wagon Mound Public Schools Bd.;*[21] *Dorothy J. v. Little Rock School Dist.;*[22] *D.R. v. Middle Bucks Area etc., School;*[23] *J.O. v. Alton Community Unit School Dist. 11.*[24] Thus, compulsory school attendance laws did not create a

---

[18] *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 655(III), 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995).

[19] *Murphy v. Bajjani*, 282 Ga. 197, 202-203(3), 647 S.E.2d 54 (2007).

[20] *Hasenfus v. LaJeunesse*, 175 F.3d 68, 71-72 (1st Cir.1999).

[21] *Armijo v. Wagon Mound Public Schools Bd.*, 159 F.3d 1253, 1261(II)(a) (10th Cir.1998).

[22] *Dorothy J. v. Little Rock School Dist.*, 7 F.3d 729, 732(II) (8th Cir.1993).

[23] *D.R. v. Middle Bucks Area etc., School*, 972 F.2d 1364, 1370(IV)(A) (3rd Cir.1992).

[24] *J.O. v. Alton Community Unit School Dist. 11*, 909 F.2d 267, 272-273(III)(A) (7th Cir.1990).

constitutional duty for Pioneer RESA to protect Jonathan from harming himself.

The Kings argue that confining Jonathan to the time-out room constituted a restraint on his liberty that was more analogous to that of an incarcerated inmate or an involuntarily-committed mental patient, and therefore Pioneer RESA had a duty to protect him. However, even if we accept the premise that sending Jonathan to the time-out room created a situation that was more analogous to that of an incarcerated inmate than to a middle-school student, the Kings' argument that Pioneer RESA deprived Jonathan of his right to substantive due process still fails. "To establish liability for a prisoner's suicide under section 1983, the plaintiff must show that the jail official displayed 'deliberate indifference' to the prisoner's taking of his own life." (Punctuation omitted.) *Gish v. Thomas.*[25] Specifically,

> [t]he plaintiff must prove that the official had *subjective* knowledge of a risk of serious harm and disregarded that risk by conduct that was constituted more than mere negligence. Deliberate indifference requires that the defendant deliberately disregard a strong likelihood rather than a mere possibility that the self-infliction of harm will occur.

---

[25] *Gish v. Thomas,* 516 F.3d 952, 954(III) (11th Cir.2008).

(Citation and punctuation omitted; emphasis supplied.) *Id. See Farmer v. Brennan.*[26] Furthermore, "[t]o be deliberately indifferent to a strong likelihood that the prisoner will commit suicide, the official must be subjectively aware that the *combination* of the prisoner's suicidal tendencies and the feasibility of suicide in the context of the prisoner's surroundings creates a strong likelihood that the prisoner will commit suicide." (Emphasis in original.) *Gish, supra*, 516 F.3d at 954-955(III).

Here, there is no evidence that the two Alpine employees who were responsible for putting Jonathan in the time-out room (Jackson and Trotter) on the day that he committed suicide acted with deliberate indifference. Both Trotter, who was working only his second day as a substitute paraprofessional at Alpine, and Jackson testified that they were not made aware by other staff that Jonathan had ever threatened to harm himself and did not know of any reason why he would do so. In fact, the Kings acknowledge that neither Jackson nor Trotter had been made aware of the alleged suicidal threats that Jonathan had made while confined to the time-out room a few weeks prior to his death. Thus, in sending Jonathan to the time-out room, neither Jackson nor Trotter deliberately disregarded a strong likelihood that Jonathan would harm himself. See *Gish*, supra, 516 F3d at 955 (III).

---

[26] *Farmer v. Brennan*, 511 U.S. 825, 835(II)(B), 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).

Accordingly, even if we were to conclude that Jonathan's confinement created an affirmative duty for Pioneer RESA to protect him from harming himself, the Kings have not demonstrated that the two school officials actually responsible for that confinement deprived Jonathan of his substantive due process rights.

(b) *Pioneer RESA was not responsible for Jonathan's suicide.* The Kings also contend that Pioneer RESA's conduct, policies, and employee training procedures demonstrated a deliberate indifference to its duty to protect Jonathan from harming himself. This contention is without merit. As discussed in Division 1(a), the Kings have failed to show that Jonathan was deprived of his right to substantive due process by any school officials. Without an underlying violation of Jonathan's constitutional rights, Pioneer RESA cannot be liable on the ground that its conduct, policies, or training procedures caused a constitutional violation. *See Collins, supra*, 503 U.S. at 120(I), 112 S.Ct. 1061; *City of Los Angeles v. Heller;*[27] *Gish, supra*, 516 F.3d at 955(III). Accordingly, the trial court did not err in granting summary judgment to Pioneer RESA as to the Kings' claims under 42 U.S.C. § 1983.

2. The Kings also contend that the trial court erred in granting DOE's motion to dismiss, arguing

---

[27] *City of Los Angeles v. Heller,* 475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986).

that the IDEA imposed a duty on DOE to regulate Alpine's use of the time-out rooms and thus that their claims against DOE are not barred by sovereign immunity. We disagree.

"We review de novo a trial court's ruling on a motion to dismiss based on sovereign immunity grounds, which is a matter of law. Factual findings are sustained if there is evidence supporting them, and the burden of proof is on the party seeking the waiver of immunity." (Citation omitted.) *Williams v. Ga. Dept. of Transp.*[28]

(a) *IDEA imposes no tort liability upon DOE.* In this matter, the Kings sued DOE for Jonathan's wrongful death, claiming that DOE was liable under OCGA § 50-21-23(a). It is undisputed that no DOE officials or employees participated directly in sending Jonathan to the time-out room on the day that he committed suicide. In addition, the undisputed evidence shows that DOE never exercised any control or oversight over Alpine's use of its time-out rooms other than generally reviewing Alpine's policies to determine whether those policies were in compliance with the IDEA. Focusing on this compliance review, the Kings contend that the IDEA, 20 U.S.C. § 1400 et seq., imposed a duty upon DOE to regulate Alpine's use of its time-out rooms and that DOE's failure to do so constituted negligence on its part. This contention

---

[28] *Williams v. Ga. Dept. of Transp.*, 275 Ga.App. 88, 89(1), 619 S.E.2d 763 (2005).

is belied by the language of the statute and relevant case law.

The IDEA was enacted, in part, "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). Toward this purpose, the IDEA authorizes federal financial assistance to states that agree to provide disabled children with special education and related services. *See* 20 U.S.C. § 1411. Under the act, DOE is responsible for general supervision over each local educational agency's compliance with the IDEA. *See* 20 U.S.C. § 1412(a)(11). A local educational agency is eligible for assistance under the act for a fiscal year, if the agency submits a plan to DOE, assuring that it has met certain required conditions. *See* 20 U.S.C. § 1413(a). Given the purpose and language of the IDEA, it is not surprising that the Eleventh Circuit Court of Appeals has held that "[a]lthough the IDEA is silent about the availability of tort-like damages, tort-like damages are simply inconsistent with the IDEA's statutory scheme." (Punctuation omitted.) *Ortega v. Bibb County School Dist.*[29] *See Sellers v. School Bd., etc.*[30] Specifically, the Court held that "the IDEA's primary purpose is to ensure a free appropriate

---

[29] *Ortega v. Bibb County School Dist.*, 397 F.3d 1321, 1325(IV) (11th Cir.2005).

[30] *Sellers v. School Bd. etc.*, 141 F.3d 524, 527(II) (4th Cir.1998).

public education, not to serve as a tort-like mechanism for compensating personal injury." (Punctuation omitted.) *Ortega, supra*, 397 F.3d at 1325(IV). The Eleventh Circuit's decision regarding this issue is in line with the decisions of its sister circuits. *See Nieves-Marquez v. Puerto Rico*;[31] *Gean v. Hattaway*;[32] *Witte v. Clark County School Dist.*;[33] *Charlie F. v. Bd. of Ed., etc.*;[34] *Heidemann v. Rother*.[35]

Citing *Gadsby v. Grasmick*,[36] the Kings nevertheless argue that the IDEA requires that each disabled child within DOE's jurisdiction is provided a free and appropriate public education. This truism, however, does not provide the Kings with a tort claim. Indeed, while the Fourth Circuit Court of Appeals in *Gadsby* found that the State's Department of Education was ultimately responsible for providing plaintiffs' child with such an education, the Court determined that the remedy for the State's failure was reimbursement of the costs expended by the plaintiffs on private schooling for their child. *Id.* at

---

[31] *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 125(III)(B) (1st Cir.2003).

[32] *Gean v. Hattaway*, 330 F.3d 758, 774(III)(F) (6th Cir.2003).

[33] *Witte v. Clark County School Dist.*, 197 F.3d 1271, 1275 (9th Cir.1999).

[34] *Charlie F. v. Bd. of Ed. etc.*, 98 F.3d 989, 991 (7th Cir.1996).

[35] *Heidemann v. Rother*, 84 F.3d 1021, 1033 (8th Cir.1996).

[36] *Gadsby v. Grasmick*, 109 F.3d 940, 952(II)(B)(3) (4th Cir.1997).

953-954(II)(B)(4). Tort-like damages were not part of the Court's consideration. Thus, the IDEA does not impose a duty upon DOE that would give rise to the tort claims that the Kings have alleged against the agency. *See Ortega, supra*, 397 F.3d at 1325(IV).

(b) *DOE has not waived its sovereign immunity.* In addition to the fact that no federal statute imposes an independent and affirmative duty upon DOE to regulate Alpine's time-out rooms, DOE's sovereign immunity shields it from liability from any State tort law claims that could conceivably pertain to this matter. Sovereign immunity extends to the State, its agencies, and its departments unless specifically waived by an Act of the General Assembly. *Bruton v. Dept. of Human Resources.*[37] "The first limitation on the waiver of the state's sovereign immunity is that it applies only to torts of state officers and employees acting within the scope of their official duties or employment." (Punctuation omitted.) *Lewis v. Ga. Dept. of Human Resources.*[38] Furthermore, Georgia's Tort Claims Act provides for a limited waiver of sovereign immunity, but also sets forth exceptions to that waiver. *Bruton, supra*, 235 Ga.App. at 293, 509 S.E.2d 363. In this matter, at least two of those exceptions apply.

---

[37] *Bruton v. Dept. of Human Resources*, 235 Ga.App. 291, 293, 509 S.E.2d 363 (1998).

[38] *Lewis v. Ga. Dept. of Human Resources*, 255 Ga.App. 805, 808, 567 S.E.2d 65 (2002).

In this matter, the Kings contend that DOE was liable for Jonathan's death because it inadequately inspected Alpine's time-out rooms. Although DOE did inspect Alpine's time-out room logs during the course of its IDEA compliance review, that inspection did not render DOE liable for injuries related to use of such rooms. OCGA § 50-21-24(8) provides:

> The state shall have no liability for losses resulting from [i]nspection powers or functions, including failure to make an inspection or making an inadequate or negligent inspection of any property other than property owned by the state to determine whether the property complies with or violates any law, regulation, code or ordinance or contains a hazard to health or safety[.]

We have previously held that "the phrase 'inspection powers and functions,' as used in [this] statute, refers to those inspection powers and functions undertaken by state officials in the performance of their official duties or employment. Such action comes within the scope of the exception, notwithstanding the source of the alleged duty to inspect." *Magueur v. Dept. of Transp.*[39] Given that the Alpine school is not a state-owned property, DOE did not waive its sovereign immunity when it inspected the logs for the school's time-out rooms. *See Lewis, supra*, 255 Ga.App. at 809, 567 S.E.2d 65.

---

[39] *Magueur v. Dept. of Transp.*, 248 Ga.App. 575, 578, 547 S.E.2d 304 (2001).

Moreover, OCGA § 50-21-24(5) provides: "The state shall have no liability for losses resulting from [a]dministrative action or inaction of a legislative, quasi-legislative, judicial, or quasi-judicial nature[.]" As we have previously held "[t]he term 'quasi' means *as if* or *analogous to,* while 'legislative' refers to the *making of laws.* So the term 'quasi-legislative' as used in OCGA § 50-21-24(5) refers to administrative action that is analogous to the making of laws." (Emphasis in original.) *Dept. of Transp. v. Watts.*[40] The Kings argue that DOE is liable for Jonathan's death because it had a duty to impose regulations upon Alpine, which it failed to do. However, given that DOE has not waived its sovereign immunity with regard to any quasi-legislative action it undertakes, it stands to reason that it similarly cannot be held to have waived its immunity when it chooses to impose no administrative regulations whatsoever. Accordingly, the trial court did not err in granting DOE's motion to dismiss the Kings' claims against it.

Judgment affirmed.

DOYLE, J., concurs.

ADAMS, J., concurs specially.

---

[40] *Dept. of Transp. v. Watts*, 260 Ga.App. 905, 906, 581 S.E.2d 410 (2003).

ADAMS, Judge, concurring specially.

I concur in the majority opinion but write to emphasize one aspect of this tragic case.

Even if placing Jonathan in the seclusion room could be seen as rising to that level of restraint of personal liberty, the Kings cannot show that the school acted with deliberate indifference to his needs because the specific risk at issue – his intent to commit suicide – had been assessed by the appropriate on-site psychologist, the person most responsible for suicide prevention at the school, and the Kings have not countered that assessment with expert testimony.

It is unchallenged that the associate director and acting school psychologist, Diana Henning, acting in her professional capacity, performed a suicide risk assessment on Jonathan in which she concluded that his suicidal statements were "learned behavior, . . . that it was an escape or an attention-getting technique," in essence, "empty threats." She concluded that Jonathan was an attention seeker, impulsive, and that he gained attention in negative ways – "he liked shock value." During her conversations with Jonathan, he did not give the indications that Henning had been trained to look for to show that he was a genuine and serious suicide risk: he never indicated that he had a plan to actually commit suicide, he did not show intent to do so, and he did not show emotional distress. Rather, he indicated that he would make comments about suicide in order to "get out of math class" because he did not like the

teacher, or because he was bored. He also said that he was kidding. This behavior followed a pattern that had been ongoing for several years.

Henning's assessment was based on her own experience with Jonathan, numerous conversations with Jonathan, her consultations with psychiatrists about Jonathan, review of psychiatric hospital reports and other third-party reports regarding Jonathan, conversations with the school staff, and conversations with Jonathan's mother, who indicated that she knew of his suicidal comments. Henning communicated this opinion to Jonathan's placement committee, to the school staff, and to Jonathan's mother. And she updated Jonathan's teacher on his status from time to time. In other words, it is undisputed that the person at the school qualified to do so, a psychologist with direct and extensive knowledge of Jonathan's behavior, had applied her professional judgment and concluded that Jonathan was not a suicide risk; and that opinion was disseminated throughout the school. Thus, even if Jackson and Trotter had full information about Jonathan's previous suicidal statements on November 15, 2004, they could not have been acting with deliberate disregard of a strong likelihood that Jonathan would harm himself because Henning's professional opinion was that there was no such risk, and they would have been entitled to rely on that opinion.

One may question Henning's judgment about Jonathan, especially in hindsight, but there is no expert testimony in the record doing so. In short,

given Henning's opinion, the Kings cannot show that the school acted with deliberate indifference to Jonathan's threats of harming himself.

IN THE SUPERIOR COURT OF HALL COUNTY
STATE OF GEORGIA

DONALD LEE KING AND TINA MARIE KING	)	
Plaintiffs,	)	
vs.	)	**CIVIL ACTION FILE**
PIONEER REGIONAL EDUCATIONAL SERVICE AGENCY, et al.,	)	**NO.: 2006-CV-3323-A**
Defendants.	)	

ORDER GRANTING DEFENDANTS PIONEER REGIONAL EDUCATIONAL SERVICE AGENCY'S and ALPINE PSYCHOEDUCATIONAL PROGRAM'S MOTION FOR SUMMARY JUDGMENT

The above-styled civil action is before the Court on Defendant Pioneer Regional Educational Service Agency's and Defendant Alpine Psychoeducational Program's Motion for Summary Judgment. Defendant Department of Education filed a Motion to Dismiss on June 5, 2007 which was granted on February 5, 2008.

This case arises from the death of Jonathan King, a thirteen-year-old student who suffered from emotional and behavioral disorders and who, at the time of his death, attended school at Defendant Alpine Psychoeducational Program's Gainesville facility ("Alpine"). Defendant Alpine is operated by Defendant Pioneer Regional Educational Service Agency ("Pioneer"). Defendant Alpine maintained a room

known as the "time-out room" or "seclusion room." On November 15, 2004, one of the teachers at Defendant Alpine gave Jonathan a rope to use as a belt to hold his pants in place around his waist because Jonathan, as was his practice, arrived at Defendant Alpine's school without a belt such that his pants were constantly subject to falling below his waist. That same day, Jonathan was locked in the seclusion room after his behavior became threatening toward other students. While in the seclusion room, Jonathan hanged himself using the rope given to him earlier in the day as a belt, resulting in his death.

On November 14, 2006, Plaintiffs, Jonathan's parents, filed this civil action against Defendant Pioneer Regional Educational Program and Defendant Alpine Psychoeducational Program asserting claims under 42 U.S.C. § 1983 for failing to adequately train employees and for failing to develop, implement, and maintain adequate policies and procedures concerning (1) the use and supervision of the seclusion room; (2) prevention of suicide by students; and (3) the supervision and handling of students with behavior disorders such as those displayed by Jonathan. Plaintiffs allege that such failures by Defendants "amounted to a conscious or deliberate indifference to, and deprivation of, the rights, privileges, and immunities secured to Jonathan under the Constitution and the laws of the United States, including but not limited to the Fourth and Fourteenth Amendments to

the U.S. Constitution,"[1] and that such failures by the Defendants proximately caused Jonathan's death. Plaintiffs narrow this allegation to the substantive protections of the Due Process Clause of the Fourteenth Amendment in their Plaintiffs' Brief in Opposition to Defendants Pioneer's and Alpine's Motion for Summary Judgment. A hearing on Defendants' Motion for Summary Judgment was held on July 9, 2008.

Discussion

In evaluating a Motion for Summary Judgment pursuant to O.C.G.A. § 9-11-56, the Court must consider all evidence in the light most favorable to the non-moving party, here Plaintiffs. Further, if the Court finds that Plaintiffs have pointed to evidence giving rise to at least one issue of material fact, summary judgment is improper, and the case must proceed to the jury. *Lau's Corporation Inc. v. Haskins*, 261 Ga. 491 (1991). On the other hand, the moving party may discharge its burden "by pointing out by reference to the affidavits, depositions and other documents in the record that there is an absence of evidence to support the nonmoving party's case. If the moving party discharges this burden, the nonmoving party cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue." *Id.* at 491.

---

[1] Complaint, page 11.

Further, "a finding of fact which may be inferred but is not demanded by circumstantial evidence has no probative value against positive and uncontradicted evidence that no such fact exists. When uncontradicted and unimpeached evidence is produced as to the real facts, the inference disappears, and does not create a conflict in the evidence so as to require its submission to a jury." *Taylor & Mathis, Inc. v. Doyle*, 219 Ga. App. 445, 446 (1995). "While there may be some 'shadowy semblance of an issue' (cit.), the case may nevertheless be decided as a matter of law where the evidence shows clearly and palpably that the jury could reasonably draw but one conclusion." *Southern Business Machines of Savannah, Inc. v. Northwest Financial Leasing, Inc.,* 194 Ga. App. 253, 255 (1990), *citing Southern Trust Ins. Co. v. Braner,* 169 Ga. App. 567, 569 (1984).

Defendants Pioneer and Alpine assert that in order for Plaintiffs to prevail under 42 U.S.C. § 1983[2], Plaintiffs must prove that Jonathan's death was caused by the deprivation of a federal constitutional right to which Jonathan was entitled and that Defendants Pioneer and Alpine are responsible for

---

[2] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . " 42 U.S.C. § 1983

the violation of Jonathan's federal constitutional right.[3] Plaintiffs must identify a policy, custom or practice of Defendants Pioneer and Alpine that caused a deprivation of Jonathan's federal constitutional rights. Defendants Pioneer and Alpine cite *Board of the County Comm'rs v. Brown*, 520 U.S. 397 (1997); *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978) and *Collins v. City of Harker Heights*, 503 U.S. 115, 120 (1992), holding that when a plaintiff asserts a § 1983 claim against a municipality, there is a two step analysis: "(1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation." Under this legal authority, this Court applies this legal principal to that case at issue.

Was Jonathan's harm caused by a constitutional violation and, if so, were Defendants Pioneer and Alpine responsible for that violation?

Plaintiffs contend that a special relationship existed between Jonathan and Defendants Pioneer and Alpine such that Defendants Pioneer and Alpine had an affirmative duty to prevent harm to Jonathan.

---

[3] Defendants rightfully assert that Defendant Alpine Psychoeducational Program is not an entity that can be sued. Defendant Pioneer, a local government agency that provides educational services to local school systems, is the managing entity for the Alpine program and is a proper party.

However, Plaintiffs have not provided legal authority from any jurisdiction that imposes an affirmative duty on a public school system to protect students from self-inflicted harm or harm inflicted by non-state actors even when a student is at school or on school property. Instead, Plaintiffs ask the Court to consider Jonathan's status analogous to that of a prison inmate or persons voluntarily committed to state mental institutions because at the time of his death Jonathan was confined to a seclusion room. Plaintiffs direct the Court to several cases in support of this assertion.

> *Howard v. City of Columbus*, 239 Ga. App. 399 (1999) – This case involved a diabetic prison inmate who died as a result of deliberate indifference to his medical condition. Medical staff members and guards were aware of Howard's deteriorating condition and deliberately ignored pleas for help. Plaintiffs showed that "defendants engaged in deliberate indifference through a policy and pattern of practice in not treating diabetics" that resulted in the deaths of ten or thirteen inmates during a twelve year period. *Id.* at 408.
>
> *Kennedy v. Schafer*, 71 F.3d 292 (8th Cir. 1995) – the United States Court of Appeals for the 8th Circuit remanded the case to the United States District Court to determine whether the child, who was originally voluntarily admitted to a mental institution by her parents, became involuntarily confined as a result of state law because the

institution had placed her on a suicide watch, and her parents no longer had an absolute right to demand she be released.

Wideman v. Shallowford Community Hospital Inc., 826 F.2d 1030 (11th Cir. 1995) – Plaintiffs brought suit for the wrongful death of their pre-term infant alleging a conspiracy existed between defendants whereby the County had a policy and practice of using its EMS vehicles to transport patients only to certain hospitals which guaranteed payment of the County's emergency medical bills. Plaintiffs' infant died following a substantial delay in treatment after emergency personnel refused to transport Mrs. Wideman to Piedmont Hospital where her physician was waiting. The United States Court of Appeals for the 11th Circuit, in discussing what constitutes a "special relationship" stated, "the rationale for imposing these special relationships 'lies in constraints the state imposes on private action.' *Id* at 1035, and further stated, "[g]iven this rationale, these special relationship cases may be viewed on a continuum. At one extreme is the person whom the state has completely deprived of his liberty by either incarceration or institutionalization, such as a prison inmate . . . or an involuntarily committed mental patient . . . The rights of the individual and the corresponding duties of the state are clearest and strongest in those contexts. Still protected, but somewhat further in along the continuum, are pretrial detainees . . . and arrestees or suspects in police custody . . . At

> the opposite end of the continuum, however, are 'members of the general public, living in the free society, and having no special custodial or other relationship with the state'. . . . Clearly, no right-duty relationship exists between those individuals and the state . . . In most cases, to establish a special relationship which creates a duty on the part of the state, the plaintiff must show that his situation lies closer to the 'incarceration' or 'custody' end of this continuum than it does to the 'unrestricted' or 'free' end. *Id* at 1035. *(internal citations omitted)*.

Plaintiffs assert that applying the continuum from *Wideman*, Jonathan's status was closer to that of "an involuntarily restrained prisoner or mental patient than a normal student in a traditional school setting."[4]

Plaintiffs offer the following case in further support of their position that an affirmative duty can exist in a school setting:

> *Waechter v. School Dist. No. 14-030 of Cassopolis, Mich.*, 773 F. Supp. 1005 (W.D. Mich. 1991) – Parents of a thirteen-year-old special education handicapped student brought suit against the school district and other defendants after a teacher forced their son to run 350 yards in less than two

---

[4] Plaintiffs' Brief in Opposition to Defendants Pioneer's and Alpine's Motion for Summary Judgment, page 19.

> minutes as punishment for talking with a classmate *knowing* that the child had a congenital heart defect. While making the run, the boy suffered cardiac arrhythmia and died. Thereafter, defendants allegedly tried to conceal the facts surrounding the boy's death by telling the parents that their son had voluntarily participated in a football game. The District Court found that a reasonable jury could conclude that the teacher's demand, "was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." *Id.* at 1010.[5]

Defendants Pioneer and Alpine assert they are entitled to summary judgment due to Plaintiffs' failure to identify any Defendant Pioneer policy, practice, custom, or act that caused Jonathan to commit suicide pursuant to the principles of liability under

---

[5] Many circuits have declined to follow *Waechter* including the Third Circuit (see *D.R. v. Middle Bucks Area Voc. Tech. Sch.*, 972 F. 2d 1364 (3rd Cir. 1992), the Fourth Circuit (see *B.M.H. v. The School Board of the City of Chesapeake, Virginia*, 833 F. Supp. 560 (4th Cir. 1993), the Seventh Circuit (see *J.O. v. Alton Commun. Unit Sch. Dist. 11*, 909 F. 2d 267 (7th Cir. 1990), the Eighth Circuit (see *Dorothy J. v. Little Rock Sch. Dist.*, 794 F. Supp. 1405 (E.D. Ark. 1992), the Tenth Circuit (see *Maldanado v. Josey*, 975 F. 2d 727 (10th Cir. 1992), and, perhaps most importantly for this Court, the Eleventh Circuit (See *Russell v. Fannin Cty. Sch. Dist.*, 784 F. Supp. 1576 (N.D. Ga. 1992).

Monell. In *Monell*, female employees of the Department of Social Services and the Board of Education of the City of New York brought suit challenging the official policy compelling pregnant employees to take unpaid leaves of absence before such absences mere medically necessary. The Supreme Court held that (1) local governments can be sued under § 1983 where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by those whose edicts or acts may fairly be said to represent official policy"[6], (2) local governments "may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such custom has not received formal approval through the body's official decisionmaking channels"[7], and (3) "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents."[8]

Having considered the evidence and argument offered by all parties, and following a thorough review of applicable legal authority, this Court finds that Defendants Pioneer and Alpine did not owe an affirmative duty to protect Jonathan from self-inflicted harm and further finds that a "special relationship" did not exist between Jonathan and Defendants Pioneer and Alpine such as those that arise with

---

[6] *Id.* at 690.

[7] *Id.* at 690, 691.

[8] *Id.* at 694.

prison inmates, involuntarily committed mental patients, or arrestees. The Court additionally finds that Plaintiffs have failed to identify an official "policy, practice, or custom" employed by Defendants Pioneer and Alpine that violated Jonathan's rights under § 1983, which resulted in or caused the suicide of Jonathan.

In making such determinations, the Court relies on *Skop v. City of Atlanta, GA*, 485 F. 3d 1130 (2007) citing the United States Supreme Court case of *Monell* " . . . it is now axiomatic that in order to be held liable for a § 1983 violation, a municipality must be found to have itself caused the constitutional violation at issue; it cannot be found liable on a vicarious liability theory. Thus, Skop can only succeed on her § 1983 claim against the City of Atlanta by showing that her injury was the result of the city's unlawful 'policy or custom.'"[9]

The evidence in this case shows that Jonathan was placed in a time-out or seclusion room following an in classroom outburst in which Jonathan displayed violent behavior toward another student. Kenneth Trotter, a substitute teacher at Alpine, was unable to gain control of Jonathan using verbal communication and was having difficulty restraining Jonathan physically.[10] With the assistance of another

---

[9] *Id.* at 1145.

[10] December 12, 2007 Deposition of Kenneth Trotter, pages 72-75.

teacher, Douglas Jackson, Trotter led Jonathan to a time-out room located approximately fifteen feet from Jonathan's classroom.[11] Once in the time-out room, Jackson asked Jonathan if the make-shift belt needed to be taken from him or did Jonathan intend to behave. Based on Jonathan's assurance that he intended to behave, the belt remained in the room with Jonathan. At some point prior to closing the door of the time-out room, Jonathan was instructed to remove his shoes whereupon Jonathan removed his shoes, and the shoes were placed on the floor in the hallway outside the time-out room.[12] During the first fifteen minutes that Jonathan was confined alone in the time-out room, Trotter was seated outside where Trotter and Jonathan communicated with each other through the closed door even though Trotter did not continuously visually observe Jonathan in the time-out room. While in the time-out room, Jonathan was hitting the door, swearing, and requesting that he be let out to use the restroom. Trotter told Jonathan that Trotter needed to see good behavior for fifteen minutes before Trotter would allow Jonathan out of the time-out room.[13] Trotter looked through the observation window after the first fifteen-minute interval had passed and was able to partially see Jonathan.

---

[11] December 12, 2007 Deposition of Kenneth Trotter, pages 80-82. May 15, 2007 Deposition of Douglas Jackson, pages 13.

[12] December 12, 2007 Deposition of Kenneth Trotter, pages 83-85. May 15, 2007 Deposition of Douglas Jackson, pages 14-17.

[13] December 12, 2007 Deposition of Kenneth Trotter, pages 89, 91.

During this time Trotter and Jonathan continued to converse through the door. Trotter made an entry in the log book noting the time and Jonathan's behavior. During the second fifteen-minute interval Jonathan quieted and after twelve minutes had passed Trotter noted the time in the log book and observed Jonathan through the window in the door. Jonathan appeared to be sitting on the floor with his back against the door. Trotter pushed open the door, intending to let Jonathan out, and discovered Jonathan's body blocking the doorway.[14]

The above illustrates the standard practices and procedures implemented by Defendant Pioneer and followed by the staff at the school relating to the use of the time-out room. It was within Trotter's discretion to communicate with Jonathan through the door, and Trotter deviated from the norm slightly by opening the door a few minutes prior to the lapse of the second fifteen-minute interval.

Counsel for the Plaintiffs argues strenuously that Jonathan, at the time of his death, was a suicide risk and that Defendants Pioneer and Alpine had knowledge of the same. However, the Court finds that the Plaintiffs set forward no evidence in the record that Jonathan was a suicide risk at the time of his death. In fact, the evidence shows that Jonathan was admitted to Peachford Behavioral Health System of

---

[14] December 12, 2007 Deposition of Kenneth Trotter, pages 92-94, 106, 108.

Atlanta and evaluated by physicians approximately one month prior to his death. Upon his discharge on October 10, 2004, Jonathan was found to be "stable, safe, and appropriate for discharge . . . "[15]

The evidence does show that on occasion Jonathan would use the threat of suicide to manipulate those preventing him from achieving a desired result. Jonathan's mother, Tina King, acknowledged several times throughout her deposition testimony that she was not concerned that Jonathan was suicidal[16] even though Jonathan often discussed and/or threatened suicide. Mrs. King recalled an instance while driving in the family's vehicle when Jonathan wanted to stop at Burger King. When it became apparent that Mrs. King was not going to stop, Jonathan wrapped his seat belt around his neck.[17] Mrs. King also acknowledged that she consented to the use of the time-out room as one of several possible consequences for Jonathan due to noncompliance with behavioral expectations.[18]

There were similar instances reported by staff members at Defendant Alpine, however, in each instance such events were reported both to Jonathan's

---

[15] Richard Stephen LaPlante, M.D., Peachford Behavioral Health System of Atlanta.

[16] January 9, 2008 Deposition of Tina Marie King, pages 96, 177, 183-184, 186

[17] January 9, 2008 Deposition of Tina Marie King, page 161.

[18] January 9, 2008 Deposition of Tina Marie King, page 107-108.

parents and to the school psychologist, Diana Henning. Dr. Henning testified during her June 8, 2007 deposition that she evaluated Jonathan on numerous occasions over a five to six year period when Jonathan threatened or seemed to suggest the possibility of killing himself. On every occasion Dr. Henning found Jonathan's threats to be without merit.[19]

As to Plaintiffs' contention that Jonathan's status was similar to that of a prison inmate such that a "special relationship" existed between Jonathan and Defendant Pioneer, the Court finds persuasive the analysis and holding in *B.M.H. v. The School Board of the City of Chesapeake, Virginia*, 833 F. Supp. 560 (E.D. Vir. 1993). In that case, a thirteen-year old student and her parents brought suit against defendants under § 1983 for failing to affirmatively protect her from being sexually assaulted by a fellow student after she reported to her teachers the preceding verbal threats made toward her by the perpetrator. Plaintiffs asserted that an affirmative duty to protect B.M.H. arose from the "special relationship" that existed between B.M.H. and the school system. In examining the long line of cases on this subject, the District Court concluded that "the relationship between the state and the individual be one that so restrains the individual that he becomes almost

---

[19] June 8, 2007 Deposition of Dr. Diana Henning, pages 65-69, 72-73, 76-78, 86-87, 97, 99.

wholly dependent upon the state for basic needs and unable to act on his own behalf." *Id.* at 569.

The court went on to examine whether B.M.H's presence in a public school under mandate of state law qualified as the type of restraint upon students that implicates the Due Process Clause of the United States Constitution. The court found that B.M.H. was not so restrained that she was prevented from acting on her behalf. Citing from a case from the Third Circuit, *D.R. v. Middle Bucks Area Voc. Tech. Sch.*, 972 F.2d 1364 (1992), the District Court wrote, "[i]t relied upon the fact that the 'parents remain the primary caretakers, despite [the student's] presence in school'" and "[a]s continuing residents of their parents' home, 'school children . . . may turn to persons unrelated to the state for help on a daily basis . . . [and] leave the school building every day. The state did nothing to restrict her liberty after school hours and thus did not deny her meaningful access to sources of help." *Id.* at 570. The District Court thus concluded that the state-imposed restriction on B.M.H.'s freedom did not create the type of physical custody necessary to bring it within the boundaries of a "special relationship."

Based on the foregoing, the Court concludes that Jonathan's death was not the result of a constitutional violation and that no special relationship existed, and thus no affirmative duty was owed to Jonathan by Defendants Pioneer and Alpine. While the decision by Trotter and Jackson to allow Jonathan to keep the makeshift belt may have amounted to negligence,

Plaintiffs have not pointed to any policy, procedure or custom of Defendant Pioneer that violated a right or privilege afforded to Jonathan under 42 U.S.C. § 1983.

IT IS THEREFORE ORDERED that Defendants Pioneer Regional Educational Service Agency's and Alpine Psychoeducational Program's Motion for Summary Judgment is granted

SO ORDERED, this 21st day of January, 2009.

C. Andrew Fuller, Chief Judge
Hall County Superior Court
Northeastern Judicial Circuit

[SEAL]

SUPREME COURT OF GEORGIA
Case No. S10C0634

Atlanta, April 19, 2010

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

DONALD LEE KING et al. v.
PIONEER REGIONAL EDUCATIONAL SERVICE AGENCY et al.

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Court of Appeals Case No. A09A1567

171

(2)

No. 10-108

Supreme Court, U.S.
FILED
SEP 20 2010
OFFICE OF THE CLERK

In The Supreme Court of the United States

DONALD LEE KING and TINA MARIE KING,

Petitioners,

v.

PIONEER REGIONAL EDUCATIONAL SERVICE AGENCY,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Georgia

BRIEF IN OPPOSITION

ALBERT M. PEARSON, III*
MORAITAKIS, KUSHEL, PEARSON & GARDNER
3445 Peachtree Road, Suite 425
Atlanta, Georgia 30326
(404) 261-0016
apearson@mkpglaw.com

PHILLIP L. HARTLEY
HARBEN, HARTLEY & HAWKINS, LLP
Wachovia Center, Suite 750
340 Jesse Jewell Parkway
Gainesville, Georgia 30501
(770) 534-7341

HARRY W. BASSLER
CRIM & BASSLER
100 Galleria Parkway, Suite 1510
Atlanta, Georgia 30339
(770) 956-1813

Attorneys for Respondent
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether Judgment Below Is Final and Unreviewable in this Court Based on Independent State Ground: Georgia Law of Case Doctrine.

2. Whether Trial Court's Grant of Summary Judgment Would Be Upheld Under Georgia's Right for Any Reason Doctrine Because Petitioners Failed to Tender Evidence to Support Their Section 1983 Claim Against Pioneer Under Any Theory of Liability Recognized Under *Monell*.

3. Whether Petitioners' Circuit Split Argument Relating to *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), Should Be Reached by this Court and Whether, in Any Event, the Court of Appeals of Georgia Misapplied *Heller* on this Record.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

JURISDICTION 4

REASONS FOR DENIAL OF THE WRIT 4

I. Judgment Below Is Final and Unreviewable in this Court Based on Independent State Ground: Georgia Law of Case Doctrine 4

II. Trial Court's Grant of Summary Judgment Would Be Upheld Under Georgia's Right for Any Reason Doctrine Because Petitioners Failed to Tender Evidence to Support Their Section 1983 Claim Against Pioneer Under Any Theory of Liability Recognized Under *Monell* 13

A. Petitioners Failed to Prove that Pioneer Was Administratively Responsible Under *Monell* for Any Policy, Custom or Practice in Effect in the Alpine Program 15

B. No Proof Pioneer Had Actual or Constructive Notice of Any Facts Indicating that Alpine Students Were At Risk of Suicide, that the Use and Monitoring of the Timeout Room Was Improper or that Alpine Employees Were Inadequately Trained 20

TABLE OF CONTENTS – Continued

Page

C. No Proof That Jonathan's Death Was Due to a Constitutional Violation Committed by Alpine's Employees or Was Otherwise Caused by Pioneer's Deliberate Indifference 23

III. Petitioners' Circuit Split Argument Relating to *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) Should Not Be Reached by this Court; In Any Event, the Court of Appeals of Georgia Did Not Misapply *Heller* on this Record 29

CONCLUSION 32

APPENDIX

U.S. Department of Justice National Institute of Corrections Prison Suicide: An Overview and Guide to Prevention Table 2-1 ..... App. 1

Chart of Georgia Regulations Governing Seclusion and Time Out ..... App. 3

Remittitur ..... App. 5

Alpine Program – Instructions for the Timeout/Seclusion Documentation Form ..... App. 7

TABLE OF AUTHORITIES

Page

CASES

Abellera v. Williamson, 274 Ga. 324, 553 S.E.2d 806 (2001) 14

Adamson v. General Electric Co., 303 Ga. App. 741, 694 S.E.2d 363 (2010) 32

Brandvain v. Ridgeview Institute, Inc., 188 Ga. App. 106, 372 S.E.2d 265 (1988) 27

California v. Rooney, 483 U.S. 307 (1987) 13

City of Canton v. Harris, 489 U.S. 378 (1989) 20

City of Gainesville v. Dodd, 275 Ga. 834, 573 S.E.2d 369 (2002) 14

City of Los Angeles v. Heller, 475 U.S. 796 (1986) ..... *passim*

Corley v. Northcoast Behavioral Healthcare Sys., 2004 WL 2521294 (Ohio Ct.Cl. Oct. 6, 2004) 27

DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189 (1989) ..... *passim*

Dolihite v. Maughon By and Through Videon, 74 F.3d 1027 (11th Cir. 1996) 27

Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729 (8th Cir. 1993) 2

D.R. v. Middle Bucks Area Voc. Tech. Sch., 972 F.2d 1364 (3d Cir. 1992) 2

TABLE OF AUTHORITIES – Continued

Page

Estate of Amergi ex rel. Amergi v. Palestinian Authority, 611 F.3d 1350 (11th Cir. 2010) 32

Fulton-DeKalb Hosp. Auth. v. Walker, 216 Ga. App. 786, 456 S.E.2d 97 (1995) 11

Gish v. Thomas, 516 F.3d 952 (11th Cir. 2008).....27

Gold v. City of Miami, 151 F.3d 1346 (11th Cir. 1998) 21

Gray v. Bostic, 458 F.3d 1295 (11th Cir. 2006) 21

Hasenfus v. LaJeunesse, 175 F.3d 68 (1st Cir. 1999) 2

Hope v. Pelzer, 536 U.S. 730 (2002) 25

Hunt v. Thomas, 296 Ga. App. 505, 675 S.E.2d 256 (2009) 11

J.O. v. Alton Community Unit Sch. Dist. 11, 909 F.2d 267 (7th Cir. 1990) 2

King v. Pioneer Reg'l Educ. Serv. Agency, 301 Ga. App. 547, 688 S.E.2d 7 (2009).....*passim*

Leon v. Monterrey Mexican Restaurant of Wise, Inc., ___ S.E.2d ___, 2010 WL 2758599 (Ga. App., Jul. 14, 2010) 11

Maldonado v. Josey, 975 F.2d 727 (10th Cir. 1992) 2

Miranda v. Fulton-DeKalb Hosp. Auth., 284 Ga. App. 203, 644 S.E.2d 164 (2007) 27

Monell v. City Dep't of Social Services, 436 U.S. 658 (1978).....*passim*

TABLE OF AUTHORITIES – Continued

Page

N. Ga. Reg'l Educ. Serv. Agency v. Weaver, 272 Ga. 289, 527 S.E.2d 864 (2000) 16, 18

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986).....19

Priester v. Lowndes County, 354 F.3d 414 (5th Cir. 2004).....2

Rhyne v. Henderson County, 973 F.2d 386 (5th Cir. 1992).....20

Smith v. Guilford Bd. of Educ., 226 Fed. Appx. 58 (2d Cir. 2007).....2

Soper v. Hoben, 195 F.3d 845 (6th Cir. 1999) 2

Stembridge v. State of Georgia, 343 U.S. 541 (1952).....13

Stevenson ex rel. Stevenson v. Martin County Bd. of Educ., 3 Fed. Appx. 25 (4th Cir. 2001).....2

West v. Tillman, 496 F.3d 1321 (11th Cir. 2007).....21

Whitt v. Stephens County, 236 Fed. Appx. 900 (5th Cir. 2007) 27

Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989).....14

Wyke v. Polk County Sch. Bd., 129 F.3d 560 (11th Cir. 1997).....2

Yellow Horse v. Pennington County, 225 F.3d 923 (8th Cir. 2000) 27

Zacchini v. Scripps Howard Broadcasting Co., 433 U.S. 562 (1977).....11, 13

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1257(a) 4

42 U.S.C. § 1983 ..... *passim*

O.C.G.A. § 5-6-10 11

O.C.G.A. § 9-11-60(h) 11

OTHER AUTHORITIES

K. Sullivan and G. Gunther, Constitutional Law 13 (15th ed. 2004) 2

http://www.ajc.com/news/georgia-schools-ban-seclusion-566901.html 25

http://www.gadoe.org/pea_board.aspx?folderID=46242&m=links&ft=2010 25

http://www.gainesvilletimes.com/archives/29701/ 25

http://www.usatoday.com/news/education/2010-02-26-school-discipline_N.htm 25

INTRODUCTION

Petitioners brought this lawsuit in the Superior Court of Hall County, Georgia.[1] Respondent Pioneer Regional Educational Service Agency ("Pioneer") is the only defendant remaining in this case and was the only defendant potentially subject to suit under 42 U.S.C. § 1983.[2] Petitioners litigated the section 1983 component of this case **solely** under *Monell v. City Dept. of Social Services*, 436 U.S. 658 (1978). As will be demonstrated, Petitioners failed to introduce any evidence to satisfy the strict proof requirements necessary to establish *Monell* liability against Pioneer. These deficiencies were so numerous and so glaring that the trial court and the Court of Appeals of Georgia had multiple, legally sufficient grounds to support the grant of summary judgment. Each of these case dispositive grounds is analytically independent from the rationale of *City of Los Angeles*

---

[1] R-1-30. Citations to "R" are to the record on appeal in the Court of Appeals of Georgia. Citations to "App." are to Respondent's Appendix to this Brief and citations to "Pet. App." are to Petitioners' Appendix.

[2] Petitioners also named the Alpine Psychoeducational Program ("Alpine") as a section 1983 defendant. The trial court dismissed this claim. Because Alpine is not a governmental entity subject to suit under Georgia law, it is not subject to suit under *Monell*. Petitioners did **not** appeal Alpine's dismissal. *King v. Pioneer Reg'l Educ. Serv. Agency*, 301 Ga. App. 547, 551, n.4, 688 S.E.2d 7, 12, n.4 (2009). This is more than a technical point. Trial counsel in state court erroneously assumed that the acts and omissions of Alpine as a program could be imputed to Pioneer under *Monell* using a species of respondeat superior liability.

v. Heller, 475 U.S. 796 (1986) – the case on which the present Petition depends. Petitioners essentially invite this Court to write an "*obiter* dissertation" on *Heller*.[3]

The Petition should be denied for three reasons:

(1) Both the trial court and Court of Appeals held that under *DeShaney v. Winnebago County*, 489 U.S. 189 (1989), Pioneer did not have an affirmative duty to protect Jonathan against self-harm because it did not have the kind of "special" or "custodial" relationship with him that might give rise to such a duty.[4] Although Petitioners raised the affirmative duty issue in their petition for certiorari to the Supreme Court of Georgia, they did

---

[3] K. Sullivan and G. Gunther, Constitutional Law 13 (15th ed. 2004) (quoting Thomas Jefferson describing *Marbury v. Madison* as "merely an *obiter* dissertation of the Chief Justice.").

[4] The ten circuit courts of appeal that have considered this issue have unanimously concluded that mandatory school attendance does not create an affirmative duty to protect students from third party harm. *Wyke v. Polk County Sch. Bd.*, 129 F.3d 560, 568 (11th Cir. 1997); *Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992); *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729 (8th Cir. 1993); *J.O. v. Alton Community Unit Sch. Dist. 11*, 909 F.2d 267 (7th Cir. 1990); *Soper v. Hoben*, 195 F.3d 845 (6th Cir. 1999); *Priester v. Lowndes County*, 354 F.3d 414 (5th Cir. 2004); *Stevenson ex rel. Stevenson v. Martin County Bd. of Educ.*, 3 Fed. Appx. 25 (4th Cir. 2001); *D.R. v. Middle Bucks Area Voc. Tech. Sch.*, 972 F.2d 1364 (3d Cir. 1992); *Smith v. Guilford Bd. of Educ.*, 226 Fed. Appx. 58 (2d Cir. 2007); *Hasenfus v. LaJeunesse*, 175 F.3d 68 (1st Cir. 1999).

not include this question in the petition now before the Court. Under Georgia's law of the case doctrine, an independent state ground, Respondent is entitled to the entry of final judgment below without reaching the *Heller* question posed by Petitioners.

(2) Petitioners failed to develop or introduce **any** evidence, **expert or otherwise**, to prove that Pioneer committed a constitutional violation or that if such a violation occurred, it could be imputed to Pioneer under **any** theory of liability recognized under *Monell v. City Dept. of Social Services*, 436 U.S. 658 (1978) and its progeny. Under Georgia's right for any reason doctrine, Respondent would be entitled to the entry of final judgment below on this ground as well, again without reaching the *Heller* question posed by Petitioners.

(3) The Georgia Court of Appeals decision in this case – as the case was actually litigated in the state courts of Georgia – rests on a reading of *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), that would be considered correct by this Court.

JURISDICTION

Respondent Pioneer agrees that the Court has jurisdiction to consider this petition for certiorari pursuant to 28 U.S.C. § 1257(a).

REASONS FOR DENIAL OF THE WRIT

Respondent takes issue with numerous aspects of the Petitioners' statement of the case that obscures more than it reveals about the circumstances surrounding Jonathan King's death. Instead of a lengthy counter-recitation of the facts, however, Respondent will note pertinent factual omissions and mischaracterizations in the course of discussing each ground for denial of the writ.

I. Judgment Below Is Final and Unreviewable in this Court Based on Independent State Ground: Georgia Law of Case Doctrine

In repackaging this case, Petitioners gloss over important facts revealing how the section 1983 component of this case was actually litigated below. Contrary to what Petitioners say about the "gravamen" of their complaint,[5] the complaint does not mention, much less reflect any awareness, of the affirmative constitutional duty issue discussed in *DeShaney v.*

[5] Petition at 17 relating to gravamen of the complaint.

Winnebago County Dep't of Social Services, 489 U.S. 189 (1989) and the several lower court cases addressing the *DeShaney* duty issue in the public school setting.[6] The complaint substantively (and incorrectly) rested on the Fourth Amendment to the U.S. Constitution; it invoked the Fourteenth Amendment apparently only insofar as that amendment makes the Fourth Amendment applicable to the states.[7] The complaint asserted that both Alpine and Pioneer were "persons" subject to suit under section 1983,[8] which was demonstrably wrong with respect to Alpine. Continuing this erroneous conflation of Alpine and Pioneer, the complaint challenged the constitutionality of Alpine's and Pioneer's policies and practices relating to the use of the timeout room[9] and suicide prevention and asserted that "their" employees were inadequately trained.[10] Finally, revealing Petitioners' misunderstanding of *Monell* principles, the complaint alleged that the actions of Jackson and Trotter – the two **paraprofessionals** directly involved in placing Jonathan in the timeout room and monitoring him – were "the actions of the **final policymaking authority** of Alpine and Pioneer" and they were "liable to

---

[6] *See supra* n.4.

[7] R-21-23.

[8] R-20, ¶ 28.

[9] This room is also referred to as a "seclusion room," but throughout this brief the room will be generally referred to as the "timeout" room.

[10] R-20-22, ¶¶ 30-32.

Plaintiffs **for the actions of Jackson and Trotter** and all damages and injuries flowing therefrom."[11]

After noting that Alpine was not a proper defendant in this case,[12] Respondent raised the issue of affirmative constitutional duty with respect to Pioneer in the first section of its opening brief in support of summary judgment.[13] In response, Petitioners acknowledged that this was the threshold issue in the case.[14] They also recognized that no circuit court case had ever found an affirmative constitutional duty based on *DeShaney* in the public school setting.[15] To overcome this analytical hurdle, Petitioners insisted that the timeout room was the legal equivalent of involuntary confinement in a prison, jail or mental health facility[16] – a position that no court had taken up to that time and no court has taken to date.[17]

---

[11] R-22, ¶ 34 (emphasis added).

[12] In its answer to the complaint, Respondent asserted as its "Seventh Defense" that Alpine lacked the capacity to be sued and was not a proper party. R-94.

[13] R-3318-3324.

[14] R-3555-3569. Without mentioning their erroneous reliance on the Fourth Amendment as the basis for *Monell* liability against Alpine and Pioneer, Petitioners invoked the protections of "substantive due process" under the Fourteenth Amendment. R-3555.

[15] R-3565, 3998-4011.

[16] R-3557-3565.

[17] Petitioners have not yet cited a single decision from any court at any level – state or federal – which has upheld a

(Continued on following page)

The trial court addressed the affirmative constitutional duty question directly. After finding that Alpine was not a proper section 1983 defendant,[18] it turned to the question of Pioneer's liability. The trial court observed that "[p]laintiffs have not provided legal authority from any jurisdiction that imposes an affirmative duty on a public school system to protect students from self-inflicted harm or harm by non-state actors even when a student is at school or on school property."[19] The trial court next discussed and explicitly rejected the Petitioners' prison/involuntary confinement rationale:

> [T]his Court finds that Defendants Pioneer and Alpine did not owe an affirmative duty to protect Jonathan from self-inflicted harm and further finds that a "special relationship" did not exist between Jonathan and Defendants Pioneer and Alpine such as those that arise with prison inmates, involuntarily committed mental patients, or arrestees. The Court **additionally** finds that Plaintiffs have failed to identify an official "policy, practice or custom" employed by Defendants Pioneer and Alpine that violated Jonathan's rights under § 1983, which resulted in or caused the suicide of Jonathan.[20]

---

challenge to the use of a seclusion, timeout or isolation room on any legal ground – constitutional, statutory or otherwise.

[18] Pet. App. at 30a.

[19] Pet. App. at 31a.

[20] Pet. App. at 35a (emphasis added).

As will be demonstrated, this paragraph reflects the undisturbed, binding law of the case under Georgia law.

On direct appeal to the Court of Appeals of Georgia, Petitioners briefed and argued affirmative constitutional duty under *DeShaney* as the threshold issue to be resolved before reaching the question of Pioneer's liability under *Monell*.[21] The Court of Appeals of Georgia framed the issues as follows:

> The Kings [Petitioners] contend that the trial court erred in granting summary judgment to Pioneer RESA as to their § 1983 claims. Specifically, they argue that questions of material fact remain as to whether Pioneer RESA had an affirmative duty, under the due process clause of the Fourteenth Amendment, to prevent Jonathan from harming himself **and** that such questions also remain as to whether Pioneer RESA's conduct, policies and employees demonstrated a deliberate indifference to that duty. **We disagree**.[22]

Petitioners now labor to evade the import of this paragraph.

---

[21] Brief of Appellants, 8-12; Reply Brief of Appellants, 3-8; Appellants' Post-Oral Argument Supplemental Brief, 1-4.

[22] *King*, 301 Ga. App. at 554, 688 S.E.2d at 14 (emphasis added).

They argue that the *DeShaney* affirmative duty issue remains open as a procedural matter under Georgia law, making the *Heller* circuit split question potentially subject to review in this Court. Bear in mind here that the trial court definitively rejected the Petitioners' affirmative duty argument and the Court of Appeals affirmed that judgment.[23] Still more to the point, the Court of Appeals rejected the Petitioners' affirmative duty argument based on Georgia's compulsory school attendance law and the contention that a student in the timeout room had the same legal status as "an incarcerated inmate or an involuntarily committed mental health patient. . . ."[24] Nevertheless, solely to reach and resolve the deliberate indifference issue as an alternative basis for the trial court's grant of summary judgment, the Court of Appeals **assumed** the existence of an affirmative constitutional duty[25] and went on to hold that Petitioners'

---

[23] As discussed in more detail *infra*, notes 29 and 30, appellate courts, including this Court, review judgments, not the analysis in opinions.

[24] *King*, 301 Ga. App. at 554, 688 S.E.2d at 14.

[25] Note the language of assumption used by the Court of Appeals: (a) "However, **even if** we accept the premise that sending Jonathan to the timeout room created a situation that was more analogous to that of an incarcerated inmate than to a middle-school student . . . " *Id.* 301 Ga. App. at 554, 688 S.E.2d at 14-15; and (b) "Accordingly, *even if* we were to conclude that Jonathan's confinement created an affirmative duty for Pioneer RESA to protect him from harming himself, the Kings have not demonstrated that the two school officials actually responsible for that confinement deprived Jonathan of his substantive due process rights." *Id.* 301 Ga. App. at 555, 688 S.E.2d at 15.

evidence was still insufficient under *Monell* to generate a triable issue against Pioneer.[26] The Court did not say or suggest it was bypassing – or "dodging" as Petitioners describe it – the affirmative duty question in order to rely on *Heller* as a preferred ground for decision.

When Petitioners sought certiorari in the Supreme Court of Georgia, they understood that they had lost in the Court of Appeals on **both** grounds and that they had to prevail in the Supreme Court of Georgia on **both** or the case was over. Accordingly, they framed the affirmative duty and *Monell* issues as logically and legally interrelated exactly as the Court of Appeals had done:

> Whether Pioneer had an affirmative duty to protect Jonathan King that arose when its employees locked Jonathan in a concrete seclusion room and held him there against his will, **and** whether a reasonable jury could conclude that Pioneer violated that duty.[27]

The Supreme Court of Georgia denied certiorari, with all seven Justices concurring.

As this case presently stands, the trial court's unreversed rejection of Petitioners' affirmative duty argument represents a final, binding, case-dispositive

---

[26] 301 Ga. App. at 556, 688 S.E.2d at 15.

[27] Petition for Certiorari in Supreme Court of Georgia, at 9. (emphasis added).

decision under Georgia's law of the case doctrine.[28] For that reason, the issue is not open to relitigation below despite Petitioners' misleading suggestions to the contrary. Thus, to maintain the viability of the *Heller* question in this Court, Petitioners should have included the affirmative duty issue in their Petition for Certiorari here, as they did in both appellate courts of Georgia. This they did not do. Because Petitioners abandoned the affirmative duty issue here, Respondent is entitled to the entry of final judgment under Georgia law on that basis alone,[29]

---

[28] *See Leon v. Monterrey Mexican Restaurant of Wise, Inc.*, ___ S.E.2d ___, 2010 WL 2758599 at *2 (Ga. App., Jul. 14, 2010) ("Under our law, after remittitur of an appealed case is returned to the trial court by an appellate court with direction, 'the decision and direction shall be respected and carried into full effect in good faith **by the court below**.' O.C.G.A. § 5-6-10") (emphasis added); *Fulton-DeKalb Hosp. Auth. v. Walker*, 216 Ga. App. 786, 456 S.E.2d 97 (1995) ("O.C.G.A. § 9-11-60(h) provides that 'the law of the case rule is abolished; . . . provided, however, that any ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent proceedings **in that case in the lower court** and in the Supreme Court or Court of Appeals as the case may be.' If the decision of an appellate court thereafter becomes 'incorrect' because the law changes – either because of subsequent case law or because of later-enacted statutes – it may not be binding precedent for other situations. However, **between the parties to the original decision**, it remains binding. . . . Any other practice would result in constant relitigation of issues as the law continually evolves.") (emphasis added).

[29] The Remittitur in this case was transmitted to the Superior Court of Hall County, Georgia on May 14, 2010 and filed there on May 17, 2010. It reads, "The case came before this court on appeal from the Superior Court of Hall County, it is

(Continued on following page)

no matter how this Court might be inclined to view Petitioners' suggestion of a relevant circuit split regarding *Heller*.

Although the law of the case doctrine in Georgia has not yet been applied to bar further litigation of the affirmative duty issue, it is a virtual certainty that it would apply based on the Remittitur transmitted to the trial court below. This procedural bar represents an independent state ground for dismissal of the Petitioners' case which weighs strongly against review of the superfluous *Heller* issue in this case. As this Court noted in *Zacchini v. Scripps Howard Broadcasting Co.*:

> If the judgment below rested on an independent and adequate state ground, the writ of certiorari should be dismissed as improvidently granted . . . for '(o)ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if that same judgment would be rendered by the state court **after** we corrected its views

---

considered and adjudged that THE JUDGMENT OF THE COURT BELOW BE AFFIRMED." App. at 5-6. The use of the term "judgment" rather than order, ruling or opinion below is significant. Under Georgia law, the grant of summary judgment is reviewed for error, not the analysis employed in the trial court. *Hunt v. Thomas*, 296 Ga. App. 505, 508, 675 S.E.2d 256, 259 (2009).

of federal laws, our review could amount to nothing more than an advisory opinion. (citations omitted)[30]

II. Trial Court's Grant of Summary Judgment Would Be Upheld Under Georgia's Right for Any Reason Doctrine Because Petitioners Failed to Tender Evidence to Support Their Section 1983 Claim Against Pioneer Under Any Theory of Liability Recognized Under *Monell.*

Reading the Petition now before this Court, one might think that, except for the *Heller* question, the Petitioners' evidence for *Monell* liability was

---

[30] 433 U.S. 562, 566 (1977) (emphasis added); *see also California v. Rooney*, 483 U.S. 307, 310 (1987) (certiorari improvidently granted in case in which State sought review in case that State won but opinion below contained undesirable analysis on a non-dispositive issue. "This Court 'reviews judgments, not statements in opinions . . . The fact that the Court of Appeals reached its decision through analysis different than this Court might have used does not make it appropriate for this Court to rewrite the California court's decision. . . .") (citations omitted). *Cf. Stembridge v. State of Georgia*, 343 U.S. 541 547 (1952) ("At this stage, the Supreme Court of Georgia could have denied certiorari on adequate state grounds. Where the highest court of the state delivers no opinion and it appears that the judgment **might** have rested on a nonfederal ground, this Court will not take jurisdiction to review the judgment.") To be clear, Respondent recognizes that the application of Georgia's law of the case doctrine as an independent **state** ground bars relitigation of a **federal** claim under section 1983.

otherwise more than enough to warrant a jury trial.[31] That is not accurate. The trial court did not rely on or even cite *Heller* in granting summary judgment. In two separate places in its order, the trial court stated flatly that there was **no constitutional violation** of Jonathan's constitutional rights **flowing from** a "policy, practice or custom" attributable to Pioneer.[32] While *Heller* provided one ground for affirmance, it was not the only case dispositive ground available to the Court of Appeals of Georgia.

Under Georgia's right for any reason doctrine, the grant of summary judgment will be upheld on appeal as long as a proper legal basis exists in the record to support affirmance.[33] Georgia courts apply

---

[31] As a matter of fact, Petitioners actually litigated this case as though they could succeed based on vicarious liability. Despite occasional nods to *Monell*'s prohibition on respondeat superior liability, nearly all of their evidence attacked the acts and decision making of individual Alpine employees. Interestingly, too, their case against the Georgia Department of Education under Georgia's Tort Claims Act was largely predicated on attributing the conduct of Alpine employees to another entity that could not be sued under section 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989).

[32] Pet. App. at 36a, 42a.

[33] "[A]n appellate court will affirm a judgment if it is correct for any reason, even if that reason is different than the reason upon which the trial court relied." *City of Gainesville v. Dodd*, 275 Ga. 834, 835, 573 S.E.2d 369, 337 (2002). *See also Abellera v. Williamson*, 274 Ga. 324, 327, 553 S.E.2d 806, 808 (2001) (holding that Court of Appeals should have applied right for any reason rule even when trial court made an error of law and did not address alternative grounds for summary judgment).

the same principle, especially in cases where summary judgment is granted and appellate review is *de novo*.[34] As this Court has recognized, appellate courts review the correctness of judgments, not the analysis in support of judgments.[35] Based on considerations of judicial economy, the right for any reason doctrine allows an appellate court to do what a trial judge could have done in the first instance. There were several valid grounds upon which the Georgia Court of Appeals could have affirmed the trial court's summary judgment. Any one of them would render Petitioners' argument for the writ based on *Heller* superfluous. Collectively, these grounds constitute a substantial **prudential** justification for denial of the writ.

A. Petitioners Failed to Prove that Pioneer Was Administratively Responsible Under *Monell* for Any Policy, Custom or Practice in Effect in the Alpine Program

Petitioners filed their section 1983 claim on the erroneous legal premise that Alpine and Pioneer were "synonymous"[36] for the purpose of *Monell* liability. In their view, the acts and omissions of Alpine could be

---

[34] *Id.*

[35] *See* notes 29 and 30 and accompanying text.

[36] R-4023.

imputed to Pioneer as a matter of law[37] – a species of respondeat superior liability as suggested earlier.[38] Trial counsel below were familiar with the legal status and organizational structure of Regional Educational Service Agencies in Georgia, having previously litigated *N. Ga. Reg'l Educ. Serv. Agency v. Weaver*, 272 Ga. 289, 291, 527 S.E.2d 864, 866 (2000) (describing a RESA in Georgia as "more closely akin to local school systems.").[39] Respondent gave immediate notice that the administrative and operational relationship between Alpine and Pioneer (or lack thereof) would be the major determinant of section 1983 liability.[40] Petitioners paid no attention to this subject until after discovery had ended and Respondent had filed a motion for summary judgment which, among other things, requested dismissal of the case against Alpine as an improper party.[41]

Petitioners' initial reaction was to trivialize the question of Alpine's party status: "Pioneer contends that it is the proper party defendant in this action

---

[37] "The Alpine Psychoeducational Program (hereinafter "Alpine") is an agency which is a part of Pioneer." R-20, ¶ 4; R-20-23, ¶¶ 28-35.

[38] *See supra* note 2.

[39] The complaint even included a citation to *Weaver* for the incorrect proposition that Alpine was a "person" properly subject to suit under section 1983. R-20, ¶ 28.

[40] Respondent's Answer stated, "'Defendant' Alpine Psychoeducational Program is **not** a legal entity capable of being sued." R-94 (emphasis added).

[41] R-3310 at n.1.

and that Alpine is not a separate entity that is subject to suit. Without accepting that position, **Plaintiffs will treat Pioneer and Alpine as one in the same** for the purposes of this motion."[42] After Respondent cited cases definitively establishing that suit against Alpine could not be maintained under section 1983,[43] Petitioners raged about "Defendants' penchant for intentionally and evasively confusing its own name and entity status in an effort to escape accountability"[44] and how "Defendants do their best to distinguish, disown and disavow Pioneer from Alpine, **as if they were separate entities,** with Alpine being a non-entity unanswerable to law or any court."[45] They likened *Monell's* exacting requirements to a "shell game."[46]

At the summary judgment stage, however, the evidence was closed. There was one fundamental problem. Because of Petitioners' fixation on Alpine as a program as being "synonymous" with Pioneer, the record was devoid of evidence addressing the necessary elements for *Monell* liability against Pioneer,

---

[42] R-3544 at n.2 (emphasis added).

[43] R-3975.

[44] R-4020.

[45] *Id.* (emphasis added).

[46] R-4021.

the only defendant potentially subject to such liability left in the case.[47]

In existence since 1976, Pioneer is part of "a statewide network of regional educational service agencies that were established to provide various shared services to local school systems."[48] Pioneer has administrative responsibility for programs in a thirteen county area in Northeast Georgia. It is the functional equivalent of a local school district under Georgia law.[49] It is governed by a "board of control" consisting primarily of school superintendents from each of these counties. One of its administrative responsibilities is to serve as the fiscal agent for programs in its territory. Alpine is one such program – the functional equivalent of a neighborhood school. As a part of the Georgia Psychoeducational Network, it provides educational services for students with severe emotional behavior disorders.[50]

Despite *Monell's* well-established evidentiary requirements, there is literally not a shred of proof that the Pioneer board had ever initiated, approved or reviewed a policy or practice at Alpine concerning (a) suicide prevention, (b) the use and monitoring of the timeout room or (c) the training of employees at

---

[47] The Petition ignores this failure of proof problem.

[48] *King*, 301 Ga. App. at 549, 688 S.E.2d at 11.

[49] *Id.*; *Weaver*, 272 Ga. at 291, 527 S.E.2d at 866.

[50] *Id.*

Alpine relating to either of the foregoing. There is also no such proof involving any other facility under Pioneer's jurisdiction. Nor is there evidence in the record identifying the members of Pioneers' governing board in 2004 or earlier or disclosing such operational facts as how often the board met, the items on meeting agendas, meeting minutes or information about how the board monitored the programs under its jurisdiction. If the Pioneer staff undertook any oversight functions on behalf of the board and made reports or recommendations on these subjects, Petitioners did not bother to uncover them. If by design, custom or practice Pioneer delegated policymaking authority to any officials in its thirteen county jurisdiction on these subjects, Petitioners never identified them as final policymakers for purposes of *Monell* liability.[51]

In the absence of some evidence that Pioneer was implicated in the formulation or enforcement of an unconstitutional policy, practice or custom that caused Jonathan's death, there simply can be no *Monell* liability against Pioneer. Petitioners assumed that Pioneer and Alpine were "synonymous" without the necessity of further proof; but *Monell* requires

---

[51] Despite alleging preposterously in their complaint that the two paraprofessionals were "final policymakers," Petitioners did not repeat that argument at summary judgment. Indeed, they never attempted to establish *Monell* liability with "final policymaker" evidence or argument at any time in this litigation as provided in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).

affirmative proof of such a relationship and then proof of causation.

B. No Proof Pioneer Had Actual or Constructive Notice of Any Facts Indicating that Alpine Students Were At Risk of Suicide, that the Use and Monitoring of the Timeout Room Was Improper or that Alpine Employees Were Inadequately Trained

Petitioners' failure to establish the role of Pioneer's board of control or to identify an unconstitutional "policy, practice or custom" attributable to Pioneer might not have been fatal to their *Monell* claim, as this Court has recognized that in "limited circumstances" a local government entity may be liable under section 1983 for its failure to train its employees. *City of Canton v. Harris*, 489 U.S. 378, 387 (1989). And, some courts have recognized that the failure to have a policy at all might give rise to *Monell* liability.[52] But to succeed with this theory of liability, Petitioners would have had to show that the need for training or a policy was "so obvious" that failure to provide either could be characterized as "deliberate indifference" to constitutional rights. *City of Canton*, 489 U.S. at 390. Evidence of a pattern of

---

[52] *See, e.g., Rhyne v. Henderson County*, 973 F.2d 386 (5th Cir. 1992).

prior unconstitutional conduct is generally required to meet this heightened standard of culpability.[53]

Petitioners had more than a year to conduct discovery. They had every opportunity to demonstrate a heightened risk of suicide at Alpine or at any other facility under Pioneer's thirteen county jurisdiction whether or not that alleged risk had anything to do with the use and monitoring of students in timeout rooms or whether the risk might be attributable to some other cause for which Pioneer might be held responsible under *Monell*. Bear in mind here that Petitioners sued the Georgia Department of Education for Jonathan's suicide as well. They could have developed evidence related to suicide risk and the use of timeout rooms on a statewide level but did not.

Petitioners did not find any such evidence even though Pioneer has been in existence since 1976. They could not and did **not** contradict Respondent's proof that over a period of nearly thirty years there had never been a single incident either at Alpine or any other program or facility within Pioneer's thirteen county jurisdiction, or at **any** psychoeducational program **throughout the state**, in which a student either committed suicide or even attempted suicide. In short, there was no evidence that Pioneer had actual or constructive knowledge of a pattern of

---

[53] *See, e.g.*, *Gold v. City of Miami*, 151 F.3d 1346 (11th Cir. 1998); *Gray v. Bostic*, 458 F.3d 1295 (11th Cir. 2006); *West v. Tillman*, 496 F.3d 1321 (11th Cir. 2007).

student self-harm at Alpine or any other facility and had ignored that pattern to the point of deliberate indifference to the well-being of students in its programs.

There is certainly no evidence that Pioneer was aware of any case specific information about Jonathan individually. But, even if such knowledge could be imputed to Pioneer actually or constructively, it would not support Petitioners' *Monell* claim. As was the case with all of its students, Alpine maintained extensive records of Jonathan's educational and psychiatric background as well as his family social history. Even though Jonathan had previously made suicide threats, **no one** believed him to be suicidal including the professionals at Alpine or even the Petitioners, his parents, who, like Alpine employees, considered his threats to be manipulative behavior.[54] Indeed, a psychiatrist who evaluated Jonathan for self-injury thirty-five days before his death assessed him as "stable, safe and appropriate for discharge."[55] Alpine employees, one of whom had read this report just days before Jonathan's death, relied on this assessment in addition to their own knowledge about Jonathan based on their professional experience and

---

[54] R-3984-3985.

[55] 2nd Supp. Ind. R-79-81. (Jonathan was evaluated by the psychiatrist because he had been caught huffing gasoline. R-3747-3759)

training, having dealt with Jonathan intermittently for nearly two years.[56]

It is telling that Petitioners did not designate a single expert – educator, psychologist or psychiatrist – to challenge the validity of Alpine employees' assessment of Jonathan as non-suicidal or the competence of those who were involved in making it.[57] It is equally telling that Petitioners did not introduce any testimony – expert or otherwise – identifying the training that Alpine employees should have been given by Pioneer and explaining how that training would have prevented Jonathan's suicide. The record abundantly reflects that the employees at Alpine were experienced and adequately trained for the tasks they were asked to perform. Predicting human behavior is not an exact science.

C. No Proof That Jonathan's Death Was Due to a Constitutional Violation Committed by Alpine's Employees or Was Otherwise Caused by Pioneer's Deliberate Indifference

At least at the outset, one of the key elements of Petitioners' case was a broad constitutional attack on the concept and use of the timeout room as a part of a progressive discipline strategy. Apart from the *ex cathedra* assertions of Petitioners' trial counsel,

---

[56] R-1468-1476.

[57] *King*, 301 Ga. App. at 559, 688 S.E. 2d at 17, J. Adams, concurring.

the record in this case is bereft of any evidence that this strategy is unconstitutional on its face or as applied to Jonathan at Alpine. This argument holds true even if there were evidence that Pioneer had actual (not constructive) knowledge of every relevant fact **collectively** known to Alpine's employees on November 15, 2004. The litany of evidentiary shortcomings is significant.

First, Petitioners did **not** contradict Respondent's proof that Petitioners expressly authorized Alpine's use of the timeout room in connection with the formulation and approval of Jonathan's Individualized Education Program ("IEP"). Each student at Alpine has an IEP and, as one might expect, all address disciplinary issues since the program deals with children who have emotional and behavioral disorders. Jonathan was a voluntary participant in the Alpine program and could have been removed at any time by Petitioners, even during the school day while he was in the timeout room. Petitioners also had the right to observe Jonathan in the classroom setting and to review all of his educational records at Alpine, which would include records of Jonathan's placement in the timeout room. There is no written documentation reflecting Petitioners' dissatisfaction with any aspect of Jonathan's treatment at Alpine prior to November 15, 2004.[58]

Second, given the nature of Petitioners' challenge to the concept of the timeout room as a progressive

---

[58] 2nd Supp. Ind. R-206-209, 211-219.

discipline measure, one might have expected Petitioners to introduce expert testimony or professional studies criticizing the use of timeout rooms generally or suggesting that there was some statistically significant correlation between their use and a heightened risk of suicide. There is literally nothing to that effect in the record. In fact, Respondent documented that in 2004 the use of timeout or seclusion rooms was expressly authorized under Georgia law for persons who were **involuntarily committed** to mental health facilities[59] and was consistent with recognized educational practice nationally. Petitioners have been unable to cite a single case holding or even addressing the question whether the use of timeout rooms in any context – educational or otherwise – is unconstitutional. Even now, Petitioners do not make reference to such a case because the case does not exist.[60]

---

[59] App. at 3-4. Petitioners include a reference to a 2010 Department of Education regulatory change limiting the use of seclusion rooms in Georgia. That change was the result of a political campaign in which the Petitioners were actively and prominently involved, a fact that the Petition neglects to mention. *See* http://www.gadoe.org/pea_board.aspx?folderID=46242&m=links&ft=2010 – video of hearing before Georgia Department of Education, June 9, 2010; http://www.ajc.com/news/georgia-schools-ban-seclusion-566901.html; http://www.usatoday.com/news/education/2010-02-26-school-discipline_N.htm; http://www.gainesvilletimes.com/archives/29701/.

[60] When asked by the trial court to focus in a sur-reply brief on "your one main federal case that you would argue creates an opportunity for you to pursue this action under an alleged violation of 42 U.S.C. § 1983" [Transcript of July 9, 2008 proceedings before Judge Fuller, p. 73], Petitioners cited to *Hope v.*

(Continued on following page)

Third, Petitioners do not dispute here that Jonathan's disruptive behavior and assault on a fellow student justified some protective intervention on the part of Alpine's staff. They consistently gloss over inconvenient facts relating to the staff's assessment of Jonathan as non-suicidal, notwithstanding his threats. As previously discussed, those facts include the assessments of not only other psychiatric professionals, but also his parents. Both the trial court and the Court of Appeals of Georgia gave great weight to this background information in their analysis of Petitioners' *Monell* claim.[61] Although this assessment turned out to be wrong, it is difficult to understand how anyone could be faulted for it either in the Alpine program or at Pioneer.[62]

Pelzer, 536 U.S. 730 (2002) and argued that some conduct is so outrageous that no precedent is necessary to find it to be unconstitutional. R-3999.

[61] *King*, 301 Ga. App. at 449-550, 559-560; 688 S.E.2d at 11-12, 17-18; Pet. App. 38a-40a.

[62] Despite Petitioners' assertions to the contrary, Alpine had a policy and practice relating to the circulation of reports to staff of suicidal ideations by students. Apart from Alpine staff testimony about the procedure used to inform the staff psychologist and parents of any suicide threats, the question in this case was whether Jonathan's suicide threats were seen as credible. As previously noted, no one believed that they were, including Jonathan's parents and every prior treating psychiatrist or psychologist known to them. To the extent that some members of the Alpine staff were unaware that Jonathan had made suicide threats, the reason was that these threats were believed to be acts of manipulation.

Fourth, Petitioners did **not** contradict Pioneer's evidence that Alpine's procedure for monitoring students in the timeout room[63] was consistent with recognized practice in Georgia and nationally not only in the educational setting at Alpine but also in jails, prisons and mental health institutions even when a person is considered to be **actively suicidal.**[64] When a student was placed in the timeout room at Alpine, someone was seated outside the door to maintain verbal contact with the student, to visually monitor the student every fifteen minutes, and to document

---

[63] App. at 1-2.

[64] *See, e.g., Gish v. Thomas*, 516 F.3d 952, 955 (11th Cir. 2008) (recognizing monitoring every 15 minutes); *Dolihite v. Maughon By and Through Videon*, 74 F.3d 1027, 1043 n.28 (11th Cir. 1996) (reversing **denial** of summary judgment in § 1983 action as to all defendants except one **individual**); *Corley v. Northcoast Behavioral Healthcare Sys.*, 2004 WL 2521294 at *2-3 (Ohio Ct.Cl. Oct. 6, 2004) (15 minute monitoring noted as standard practice); *Whitt v. Stephens County*, 236 Fed. Appx. 900 (5th Cir. 2007) (every 30 minutes); *Yellow Horse v. Pennington County*, 225 F.3d 923, 928-929 (8th Cir. 2000) (every 30 minutes); *Miranda v. Fulton-DeKalb Hosp. Auth.*, 284 Ga. App. 203, 204, 644 S.E.2d 164, 166 (2007) (failure to monitor suicidal patient continuously, instead of monitoring every 15 minutes, held **not** to be cause of patient's suicide); *Brandvain v. Ridgeview Institute, Inc.*, 188 Ga. App. 106, 111, 372 S.E.2d 265, 269 (1988) (grant of judgment n.o.v. for Ridgeview reversed in medical malpractice action in part because Ridgeview staff *failed* to implement 15 minute checks of patient at risk of suicide; checks were part of Ridgeview suicide prevention policy). In neither of the two Georgia cases did plaintiffs argue that monitoring suicidal patients every 15 minutes was negligent in itself.

the entire interaction.[65] This is exactly the procedure followed for Jonathan on the day of his death.[66] Petitioners have not cited a single case holding that **continuous visual monitoring** is required for **involuntarily confined persons** who might be a suicide risk or who are considered to be actively suicidal.[67] Finally, the procedure contemplated that any "hazardous articles" should be taken from the student.[68] Petitioners think that a more specific definition of "hazardous articles" would have made a constitutionally significant difference in this case. But as is true of all of their attacks on Alpine's policies and procedures, they do not point to a single case supporting this proposition. Indeed, Petitioners did not tender a single example of an alternative formulation of this or a similar term that might have changed the outcome for Jonathan. None of Georgia's Department of Human Resources regulations relating to seclusion rooms gives a specific definition of "hazardous article."[69] In this case, the Alpine paraprofessional, Jackson, consciously applied the timeout procedure when he asked Jonathan whether there would be a problem keeping the macramé belt to hold

---

[65] The written procedure and documentation used is reproduced at App. 7-9.

[66] R-554-555, 557, 3429-3430, 3433, 3435-3436, 3448-3451, 3453-3456.

[67] Thus, even if one were to accept Petitioners' premise that putting Jonathan in the timeout room was equivalent to putting someone in jail, their *Monell* claim would still fail.

[68] App. at 7.

[69] App. at 3-4.

up his pants. And when Jonathan said no, Jackson had reason to believe him, based on his familiarity with Jonathan. Neither Jackson's decision about the macramé belt nor the Alpine procedure under which he acted reflects deliberate indifference to Jonathan's well-being.

III. Petitioners' Circuit Split Argument Relating to *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) Should Not Be Reached by this Court; In Any Event, the Court of Appeals of Georgia Did Not Misapply *Heller* on this Record.

There were and are multiple, case dispositive alternative grounds for upholding the trial court's grant of summary judgment below. However intriguing the *Heller* circuit split issue might be as an intellectual exercise, resolution of that split would have no ultimate effect on the outcome below on remand because of Georgia's law of the case and right for any reason doctrines. As this Court and Georgia courts recognize, the object of appellate review is the correctness of judgments, not necessarily the correctness of the analysis employed.[70] Petitioners ask for what in practical effect would be an advisory opinion from this Court.

Petitioners describe *Heller* as an "easy"[71] case and then distinguish it from the present case in a way

---

[70] *See infra* notes 29 and 30 and accompanying text.

[71] Pet. at 27.

that makes the *Heller* circuit split seem more relevant than it actually is. The key to a proper understanding of *Heller*, they reason, is the fact that the challenge to the Los Angeles excessive force policy turned on the alleged misconduct of a **single** police officer. Because the jury determined that the single officer did not commit a **constitutional violation**, it followed in *Heller* that there could be no *Monell* liability against the City of Los Angeles. The distinction that Petitioners make here is that even though no single official at Alpine violated Jonathan's constitutional rights, it is still possible for Pioneer to be held liable under *Monell* because the "combined actions" of several Alpine officials may have resulted in a constitutional violation.

Conspicuously absent from Petitioners' factual statement is a description of the litigation strategy actually utilized by trial counsel below. It sheds considerable light on *Heller*'s application in this case. Petitioners emphasize the distinction between the actions and judgments of **individual** Alpine employees – none of which they admit were unconstitutional – and their **collective effect** which they allege caused a violation of Jonathan's constitutional rights. Petitioners did not make this distinction below. Again and again, they quoted or cited the deposition testimony of Stanley Stover, Director of Alpine, to the effect that his employees, in dealing with Jonathan, had "faithfully and properly" executed

Alpine's policies and customs.[72] This comment became the centerpiece of their litigation strategy.

Petitioners asserted a direct evidentiary link between the "faithfully and properly" executed policies at Alpine and the **collective** actions of Alpine's employees.[73] In fact, after Alpine was dismissed as a defendant in this case neutralizing Petitioners' doctrinally spurious version of respondeat superior liability, the **only** proof of a constitutional violation remaining in the record was quite literally the **individual and collective actions** of Alpine's em-ployees. If neither **the individual nor the collective actions** of the Alpine employees were unconstitutional as Respondent contended and the trial court

---

[72] R-3543.

[73] *See, e.g.*, Plaintiffs' Post-Oral Argument Supplemental Brief and Response to Defendants' Reply Brief, at 15 ("By analogy, in this case, Alpine's own director admits that what occurred here was a **faithful execution** of Alpine's policies, procedures and customs.") (emphasis supplied); Brief of Appellants in Court of Appeals of Georgia, at 2 ("The school's director says that all of this was a **faithful execution of the school's policies and procedures**.") (emphasis in original); *Id.* at 16 ("Given Stover's testimony that allowing Jonathan to keep the rope was a **'faithful execution'** of Alpine's policies (Stover Dep., pp. 99-100), the **deliberate indifference** that resulted is no wonder.") (emphasis supplied); Petition for Writ of Certiorari in Supreme Court of Georgia, at 4 ("Stan Stover, Alpine's director, testified that Trotter and Jackson's actions on November 15, including their allowing Jonathan to take a rope into the seclusion room, represented a **faithful execution** of the school's policies and procedures.") (emphasis supplied).

expressly found,[74] it follows **on this record** that Alpine's "faithfully and properly" executed policies and procedures likewise could not be deemed unconstitutional. The core logic of *Heller* applies and Respondent believes that the result would be the **same** in every circuit on this record notwithstanding Petitioners' insistent on a circuit split. In the final analysis, trial counsel below invited this analytical approach and should not be allowed to disavow it here.[75]

CONCLUSION

This is a fact-intensive case in which the trial court correctly granted Respondent's motion for summary judgment. From the standpoint of proving a *Monell* violation, the case was a muddle in conception

---

[74] Pet. at 36a. ("The Court additionally finds that Plaintiffs have failed to identify an official 'policy, practice or custom' employed by Defendants Pioneer and Alpine that violated Jonathan's rights under § 1983, which resulted in or caused the suicide of Jonathan.").

[75] *See, e.g., Estate of Amergi ex rel. Amergi v. Palestinian Authority*, 611 F.3d 1350, 1367 (11th Cir. 2010) ("Finally, the Amergis have admitted that it was they who first suggested the Rule 21 severance, and '[i]t is a cardinal rule of appellate review that a party may not challenge as error a ruling or other trial proceeding invited by that party.' "); *Adamson v. General Electric Co.*, 303 Ga. App. 741, 743, 694 S.E.2d 363, 367 (2010) ("Induced error is impermissible. . . . A party cannot claim error . . . where he himself committed or invited the error. . . . [Cit.]") (citations omitted).

and execution. Even if a majority of this Court were to believe that *Heller* is an outlier decision in reasoning or result, the judgment of the trial court on remand would be affirmed under Georgia's law of the case and right for any reason doctrine. There is no compelling justification for the grant of the writ. Respondent respectfully requests that the writ be denied.

Respectfully submitted,

ALBERT M. PEARSON, III*
MORAITAKIS, KUSHEL, PEARSON & GARDNER
3445 Peachtree Road, Suite 425
Atlanta, Georgia 30326
(404) 261-0016
apearson@mkpglaw.com

PHILLIP L. HARTLEY
HARBEN, HARTLEY & HAWKINS, LLP
Wachovia Center, Suite 750
340 Jesse Jewell Parkway
Gainesville, Georgia 30501
(770) 534-7341

HARRY W. BASSLER
CRIM & BASSLER
100 Galleria Parkway, Suite 1510
Atlanta, Georgia 30339
(770) 956-1813

Attorneys for Respondent
**Counsel of Record*

U.S. Department of Justice
National Institute of Corrections

Prison Suicide: An Overview and Guide to Prevention

(Table 2-1 follows at App. 2)

TABLE 2-1
SUICIDE PREVENTION PROTOCOLS WITHIN DEPARTMENTS OF CORRECTION

DOC	Prevention Policy	Training	Screening/ Assessment	Housing	Suicide Watch Levels (in minutes)	Inter-vention	Admin Review	Last Revision
Alabama				x	15			5193
Alaska		x	x		15, 30, 60			2/93
Arizona	x		x	x	10			8/89
Arkansas								
California	x	x	x	x	constant/ unspecified			no date
Colorado	x	x		x	30, 60			9/93
Connecticut	x	x	x	x	constant, 15			7/92
Delaware	x	x	x	x	15		x	7/93
District of Col.	x		x		15, 30, 60			6/93
Florida	a			x	constant, 15, 30			10/93
Georgia			x					1/91
Hawaii	x	x	x	x	constant, 15	x		2/93
Idaho	x		x					11/93
Illinois	x			x	10, 15			5/91
Indiana								
Iowa	x				15, 30			3/90
Kansas	x	x		x	10-15			3/93
Kentucky								
Louisiana	x	x	x	x	5-15			9/93
Maine		a	x		constant, 15			Draft/94
Maryland	x			x				2/92
Massachusetts			x	x				5/93
Michigan	x	x	x	x	10			12/91
Minnesota	x		x	x	15, 30			5/92
Mississippi	x			x	5			11/93
Missouri	x		x	x	15			6/92
Montana	x	x	x	x	15			5/93
Nebraska	x	a						12/93
Nevada	x	x	x	x	constant, 15			8/93
New Hampshire	x		x	x	15, 30, periodic			8/93
New Jersey	x				15			7/92
New Mexico	x			x	constant			1/92
New York		x		x	constant 5, 15			9/92
North Carolina	x	x	x	x	constant 15			7/93
North Dakota		x		x	15, 30			9/93
Ohio	x	x	x	x	5, 15			12/92
Oklahoma	x		x	x	15			5/92
Oregon	x	x	x	x	10-15			no date
Pennsylvania	x	x	x	x	constant, 15, 30			4/94
Rhode Island	x			x	15	x		4/88
South Carolina	x	x	x					3/86
South Dakota	x	x	x		15		x	6/91
Tennessee	x	x		x				11/92
Texas	x			x	15			10193
Utah	x			a	15			2/94
Vermont	x		x	x	constant, 10-15			4/82
Virginia	x	x		x	constant, 15			2/92
Washington					constant, 15			6/84
West Virginia	x				15			5/87
Wisconsin				x	15			4/90
Wyoming		x			constant, 15			10192
Federal Bureau of Prisons	x		x					4/90

DHR Program	"Seclusion" Defined	"Time Out" Defined	"Seclusion Room" Reasons for Use	Monitoring Required	Removal Harmful Objects
Child Caring Institutions	Involuntary confinement in room; "imminent" threat to self or others. **290-2-5-.03(dd)**	Behavior management tool; separation child from group; not to exceed 20 minutes. To deescalate child. **290-2-5-.03(ff)**	If child is danger to self or others; no more than 30 minutes w/o approval of director; no more than one hour each day w/o medical or psych authorization. Documentation must be kept. **290-2-5-.14(2)(p)**	Yes. Visual through viewing window; every 15 minutes; log kept. **290-2-5-.14 (2)(p)**	Seclusion room constructed to minimize risk of harm to child; room "must be free of any item that may be used . . ." to cause physical harm to" self or others. Harmful items *not* listed or further defined. **290-2-7-.14(2)(p)**
Outdoor Child Caring	Involuntary confinement in room; 'imminent" threat to self or others. **290-2-7-.01(ee)**	Behavior management tool; separation child from group; not to exceed 20 minutes. To deescalate child. **290-2-7-.01(ii)**	If child is danger to self or others; no more than 30 minutes w/o approval of director; no more than one hour each day w/o medical or psych authorization. Documentation must be kept. **290-2-7-.09(2)(p)**	Yes, Visual through viewing window; every 15 minutes; log kept. **290-2-7-.09(2)(p)**	Seclusion room constructed to minimize risk of harm to child; room "must be free of any item that may be used . . . to cause physical harm to" self or others. Harmful items *not* listed or further defined. **290-2-7-.09(2)9p)**
Drug Abuse Treatment & Education (Adults)	Involuntary confinement in room "imminent" threat to self or others. **290-4-2.03(v)**	Behavior management tool; separation child from group; not to exceed 20 minutes. To deescalate client. **290-4-2.03(z)**	If child is danger to self or others; no more than 30 minutes w/o approval of director; no more than one hour each day w/o medical or psych authorization. Documentation must be kept. **290-4-2.26(2)(q)**	Yes, Visual through viewing window; every 15 minutes; log kept. **290-4-2.26(q)**	Seclusion room constructed to minimize risk of harm to child; room "must be free of any item that may be used . . . to cause physical harm to" self or others. Harmful items *not* listed or further defined. **290-4-2.26(2)(q)**

DHR Program	"Seclusion" Defined	"Time Out" Defined	"Seclusion Room" Reasons for Use	Monitoring Required	Removal Harmful Objects
Residential Mental Health Facilities for Children & Youth	Involuntary confinement in room; "imminent" threat to self or others. **290-4-4.02(dd)**	Behavior management tool; restricts patient to designated area; to deescalate and to regain self-control. **290-4-4.02(hh)**	If patient exhibits dangerous conduct threatening immediate harm to self or others. **290-4-4.07(2)(j)**	Yes. Visual through viewing window; *no* time specified for frequency of monitoring; log kept **290-4-4.07 (2)(j)**	Seclusion room constructed to minimize risk of harm to child; room "must be free of any item that may be used . . ." to cause physical harm to" self or others. Harmful items *not* listed or further defined. **290-4-4.07(2)(j)**
Foster Care Services	Involuntary confinement in room; "imminent" threat to self or others. **290-9-2-.01(ii)**	Behavior management tool; brief separation of child from group, not to exceed 20 minutes; deescalate child's emotionally charged condition. **290-9-2-.01(kk)**	If child is danger to self or others; no more than 30 minutes w/o approval of director; no more than one hour each day w/o medical or psych authorization. Documentation must be kept. **290-9-2.07(8)(d)(15)**	Yes, Visual through viewing window; every 15 minutes; log kept. **290-9-2.07(8)(d)(15)**	Seclusion room constructed to minimize risk of harm to child; room "must be free of any item that may be used . . . to cause physical harm to" self or others. Harmful items *not* listed or further defined. **290-9-2.07(8)(d)(15)**
Adoption	Involuntary confinement in room; "imminent" threat to self or others. **290-9-2-.01(ii)**	Behavior management tool; brief separation of child from group, not to exceed 20 minutes; deescalate child's emotionally charged condition. **290-9-2-.01(kk)**	Use limited time period "appropriate" to child's age, intelligence, emotional makeup and previous experience. **290-9-2-.06(c)(2)(x)**	Yes. To extent "necessary to insure child's safety and well/being." **290-9-2-.06(c)(2)(x)**	Seclusion not allowed in "room or area which may reasonably be expected to cause physical or emotion damage to the child." Harmful items *not* listed or further defined. **290-9-2-.06(c)(2)(ix)**

REMITTITUR

Court of Appeals
of the State of Georgia

ATLANTA, NOVEMBER 05, 2009

The Court of Appeals having met, the following judgment was rendered:

COURT OF APPEALS CASE NO. A09A1567
DONALD LEE KING ET AL V. PIONEER REGIONAL EDUCATIONAL SERVICE AGENCY ET AL

This case came before this court on appeal from the SUPERIOR Court of HALL county; it is considered and adjudged that

THE JUDGMENT OF THE COURT BELOW BE AFFIRMED.

BLACKBURN, P.J., AND DOYLE, J., CONCUR. ADAMS, J., CONCURS SPECIALLY.

LC NUMBERS: 2006CV3323

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta, **MAY 14, 2010**

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk

/s/ William L. Martin, III

Court of Appeals Cost $300.00 O.C.G.A. Sec. 5-6-10. No costs are payable to the Court of Appeals.

ALPINE Program

Instructions for the Time-Out / Seclusion Documentation Form

1. Place the student's name and date on the top line.
2. Write the TIME the Time-Out/Seclusion was initiated and the name of the staff member that initiated the seclusion.
3. In the "Reason for Time-Out/Seclusion" describe the behavior necessitating the time-out/seclusion.
4. Search the student for hazardous articles before secluding. Staff member performing the search should initial the box.
5. Place Appropriate CODES in the corresponding time slots and initial.
6. Note any abnormalities on student BEFORE and AFTER the time-out/seclusion and document (note scratches, bruises, etc.) If there were no abnormalities please write N.A. in that box.
7. Write the TIME the Time-Out/Seclusion was discontinued and the name of the staff member monitoring at that time.
8. Submit a copy of this DOCUMENT FORM to Judy within 1 school day.

9. Keep original in notebook provided at time out.

10. If student is physically escorted, restrained during search procedures or for any reason, if student is injured or staff is injured or struck by student, an Incident Form must be filled out and turned in to Judy that day.

ALPINE Program
Time Out/Seclusion
Documentation

Student Name: _____ Date: _____

Time initiated: _____ By: _____ | Check each student before secluding

Time Discontinued: _____ By: _____

Reason for Time Out/Seclusion: _____

Codes

Escalating

1. Beating on door
2. Yelling
3. Crying
4. Laughing
5. Singing
6. Mumbling
7. Pacing
8. Threatening
9. Combative
10. Cursing
11. Other:_____
12. Student Escorted physically to time out

De-Escalating

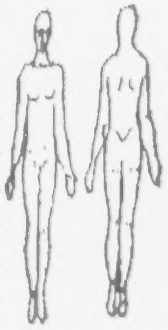
13. Standing Still
14. Lying or Sitting
15. Quiet
16. Sleeping
17. Verbally contract to control behavior
18. Identify out of control behavior
19. Not threatening
20. Can ID other options
21. Other: _____

Visual Checks Made on Student

Use codes listed at left to document behavior

7:30 AM		12:15 PM	
7:45 AM		12:30 PM	
8:00 AM		12:45 PM	
8:15 AM		1:00 PM	
8:30 AM		1:15 PM	
8:45 AM		1:30 PM	
9:00 AM		1:45 PM	
9:15 AM		2:00 PM	
9:30 AM		2:15 PM	
9:45 AM		2:30 PM	
10:00 AM		2:45 PM	
10:15 AM		3:00 PM	
10:30 AM		3:15 PM	
10:45 AM		3:30 PM	
11:00 AM		3:45 PM	
11:15 AM		4:00 PM	
11:30 AM		4:15 PM	
11:45 AM		4:30 PM	
Noon		4:45 PM	

Use the diagram on the right to note any injuries or bruises on the student both before and after the time-out/ seclusion and comment below.



(2)

No. 10-108

In The
Supreme Court of the United States

DONALD LEE KING and TINA MARIE KING,

Petitioners,

v.

PIONEER REGIONAL
EDUCATIONAL SERVICE AGENCY,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Georgia Third Division

PETITIONERS' REPLY BRIEF

ERIC SCHNAPPER*
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@u.washington.edu

E. WYCLIFFE ORR, SR.
SPENCE JOHNSON
DUSTIN MARLOWE
ORR BROWN JOHNSON LLP
P.O. Box 2944
Gainesville, GA 30505
(770) 534-1980

Attorneys for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

I. The Existence of An Important Conflict Among The Lower Courts Is Not Disputed 1

II. The Court of Appeals Decision Did Not Rest On An Independent Ground Precluding Review by This Court 2

III. The Existence of Unresolved Defense Contentions Does Not Preclude Review of The Question Presented 12

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES:

Anderson v. City of Atlanta, 778 F.2d 678 (11th Cir. 1985) 1, 2

Chambers v. United States, 129 S.Ct. 687 (2009) 6

City of Los Angeles v. Heller, 475 U.S. 796 (1986) ..... *passim*

DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189 (1989) 3, 5, 8

Florida v. Powell, 130 S.Ct. 1195 (2010) 4

Gibson v. County of Washoe, 290 F.3d 1175 (9th Cir. 2002) 2

Gish v. Thomas, 516 F.3d 952 (11th Cir. 2008) 5

Graham v. Florida, 130 S.Ct. 2011 (2010) 6

Harris v. Reed, 489 U.S. 255 (1989) 4

Kawasaki v. Kisen Kaisha Ltd v. Regal-Beloit Corp., 130 S.Ct. 2433 (2010) 6

King v. Pioneer Regional Educational Service Agency, No. S10C0634 ..... 2, 9, 10

King v. Pioneer Regional Educational Service, Court of Appeals Case No. A09A1567 ..... 1, 10, 11

Michigan v. Long, 463 U.S. 1032 (1983) 4, 8, 13

Minnesota v. National Tea Co., 309 U.S. 551 (1940) 4

TABLE OF AUTHORITIES – Continued

Page

Stembridge v. Georgia, 343 U.S. 541 (1952).....4

Waddington v. Sarausad, 129 S.Ct. 823 (2009).....6

Yeager v. United States, 129 S.Ct. 2360 (2009).....6

STATUTES:

O.C.G.A. § 9-11-60(h).....11

I. THE EXISTENCE OF AN IMPORTANT CONFLICT AMONG THE LOWER COURTS IS NOT DISPUTED

Respondent acknowledges the existence of the inter-circuit conflict described in the petition regarding *City of Los Angeles v. Heller*, 475 U.S. 796 (1986). (Br. Opp. 9 ("the *Heller* circuit split question"), 29 ("however intriguing the *Heller* circuit split issue might be"; "resolution of that split"), 30 ("the *Heller* circuit split")). Respondent also agrees that the decision of the Georgia Court of Appeals involved an interpretation of *Heller*. "The Georgia Court of Appeals decision in this case ... rests on a reading of *City of Los Angeles v. Heller*." (Br. Opp. 3; see *id.* 29 ("the Court of Appeals of Georgia did not misapply *Heller*")).

The issue set out in the petition was repeatedly litigated by plaintiffs in the courts below[1]; in the

---

[1] Motion for Reconsideration, *King v. Pioneer Regional Educational Service*, Court of Appeals Case No. A09A1567, at 6 (quoting decision in *Anderson v. City of Atlanta*, 778 F.2d 678, 686 (11th Cir. 1985) that "[a]lthough the acts or omissions of no one employee may violate an individual's constitutional rights, the combined acts or omissions of several employees acting under a governmental policy or custom may violate an individual's constitutional rights"), 7 (Court of Appeals reliance upon *Heller* was "misplaced").

Appellants' Reply to Response of Appellee Pioneer RESA on Appellants' Motion for Reconsideration, Court of Appeals Case No. A09A1567, at 2 ("*Heller* does not preclude Pioneer's liability"), 3 ("the error of this Court's reliance on *Heller*), 4 ("Pioneer's suggestion that *Heller* precludes liability ... is demonstrably

(Continued on following page)

Georgia courts plaintiffs relied on many of the same federal circuit court decisions set out in the petition for certiorari in this Court.

II. THE COURT OF APPEALS DECISION DID NOT REST ON AN INDEPENDENT GROUND PRECLUDING REVIEW BY THIS COURT

In the courts below, in addition to advancing the *Heller* argument on which it there prevailed, respondent also contended that Pioneer had no affirmative constitutional duty to protect Jonathan King. In its brief in opposition, Pioneer argues that the Court of Appeals actually decided this constitutional issue and held that respondent had no such affirmative duty. A decision by the Court of Appeals on that alternative argument, Pioneer argues, would constitute an independent state ground barring review by this Court of the *Heller* issue. However,

---

wrong"), 6 (*Heller* is "distinctly *unlike* the instant case in which the alleged constitutional violation is not solely attributable to an individual actor") (emphasis in original), 7 (Court of Appeals "misapplied *Heller*").

Petition for Writ of Certiorari, *King v. Pioneer Regional Educational Service Agency*, No. S10C0634, at 15 (*Heller* did not overrule favorable Eleventh Circuit decision in *Anderson v. City of Atlanta*), 15-16 ("*Heller* ... has no application here because the Kings have never contended that Trotter and Jackson were *solely* responsible for Jonathan's death") (emphasis in original), 17-18 (quoting holding in *Gibson v. County of Washoe*, 290 F.3d 1175, 1186 n.7 (9th Cir. 2002) that *Heller* is not applicable in all cases in which individual defendants were not liable).

as we explain below, that was not the basis of the Georgia Court of Appeals decision. Rather, the Court of Appeals rejected plaintiffs' claim only under *Heller*, holding that Pioneer could not be held liable regardless of whether the collective actions of several of its employees had indeed resulted in a constitutional violation.

Whether Pioneer had a constitutional duty to protect Jonathan is governed by this Court's decision in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), and its progeny. "[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." 489 U.S. at 199-200. The lower courts have generally held that the mere obligation to attend public school does not without more create an affirmative duty to protect ordinary students. (See Pet. App. 12a-13a). The question in this case was whether when Pioneer confined Jonathan King in the "seclusion room," and "h[e]ld[ ] him there against his will," it had "to assume some responsibility for his safety." Pioneer contends that the Court of Appeals in fact resolved this constitutional issue, and that its decision on this constitutional question is thus an alternative state ground that bars review by this Court of the Court of Appeals decision regarding *Heller*.

The standard for demonstrating the existence of an independent state ground is well-established and demanding. To defeat review of the Court of

Appeals' resolution of the *Heller* issue, respondent must show that "the state court decision indicates clearly and expressly that it is alternatively based on bone fide separate, adequate and independent grounds." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983)[2]; see *id.* at 1041 ("plain statement"), 1042 (requirement of a "plain statement"), 1042 n.7 ("we require a clear and express statement that a decision rests on adequate and independent grounds"). The Court will assume there is no independent ground where it "is not clear from the face of the opinion." 463 U.S. at 1041. The "plain statement" requirement stems from a recognition that "it is ... important that ambiguous or obscure adjudications by state courts do not stand as barriers to determination by this Court of the validity under the federal constitution of state action." *Id.* (quoting *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940)); see *Florida v. Powell*, 130 S.Ct. 1195, 1201 (2010) (quoting *Long* and *National Tea Co.*). "Ambiguities in th[is] regard must be resolved by application of the *Long* standard." *Harris v. Reed*, 489 U.S. 255, 262 (1989).

The Court of Appeals did not resolve the constitutional question regarding whether Pioneer had an affirmative duty to protect Jonathan King. The Court

[2] Respondent relies on the very different rule in *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952). (R.Br. 13 n.30). *Stembridge* has not been the law for more than a quarter of a century; it was last cited in this Court in Justice Stevens' dissent in *Long*. 463 U.S. at 1060 (Stevens, J., dissenting).

of Appeals referred in only a single sentence to plaintiff's argument that use of the time-out room constituted confinement under *DeShaney*, and then turned immediately to the *Heller* analysis that was the actual basis of its decision.

> The Kings argue that confining Jonathan to the time-out room constituted a restraint on his liberty that was more analogous to that of an incarcerated inmate or an involuntarily-committed mental patient, and therefore Pioneer RESA had a duty to protect him. *However, even if we accept the premise* that sending Jonathan to the time-out room created a situation that was more analogous to that of an incarcerated inmate than to a middle-school student, the Kings' argument that Pioneer RESA deprived Jonathan of his right to substantive due process still fails. "To establish liability for a person's suicide under section 1983, the plaintiff must show that the jail official displayed 'deliberate indifference; to the prisoner's taking of his own life.'"

(Pet. App. 14a) (emphasis added) (quoting *Gish v. Thomas*, 516 F.3d 952, 954 (11th Cir. 2008)). The Court of Appeals opinion contains no discussion whatever of whether the circumstances under which Jonathan King was confined in the "seclusion room" were or were not sufficiently similar to incarceration or involuntary commitment to give rise to an affirmative constitutional duty of protection.

Respondent contends that the phrase "even if we accept the premise" somehow indicated that the Court of Appeals had indeed rejected plaintiff's contention. (Br. Opp. 9 and n.25). The phrase "even if," however, can refer to a premise the speaker thinks likely ("I am going to the playoffs even if the Yankees are playing") or is unlikely ("I am going to the playoffs even if the Nationals are playing"). This Court has used the phrase "even if" to refer to a premise the Court has accepted,[3] to a premise the Court has rejected,[4] and to a premise about which the Court has no view.[5] As used in the opinion below the phrase "even if" signals that the Court of Appeals was hypothesizing an answer to a constitutional question it was not deciding.[6]

---

[3] E.g., *Yeager v. United States*, 129 S.Ct. 2360, 2370 (2009) ("the Government argues that even if we conclude (as we do) ... ").

[4] E.g., *Kawasaki v. Kisen Kaisha Ltd v. Regal-Beloit Corp.*, 130 S.Ct. 2433, 2446 (2010); *Waddington v. Sarausad*, 129 S.Ct. 823, 833 (2009).

[5] E.g., *Graham v. Florida*, 130 S.Ct. 2011, 2032 (2010); *Chambers v. United States*, 129 S.Ct. 687, 692 (2009).

[6] Later in its opinion the Court of Appeals used a similar phrase.

> [I]n sending Jonathan to the time-out room, neither Jackson nor Trotter deliberately disregarded a strong likelihood that Jonathan would harm himself.... *Accordingly, even if* we were to conclude that Jonathan's confinement created an affirmative duty for Pioneer RESA to protect him from harming himself, the Kings have not demonstrated that the two school officials actually responsible for that confinement deprived Jonathan of his substantive due process rights.

(Continued on following page)

The Court of Appeals' opening summary of its decision refers exclusively to its holding (under *Heller*) that Pioneer could not be liable because no individual staff member had been deliberately indifferent to the danger to Jonathan.

> [W]e find that the Kings have not met the requirements of § 1983 in that they have not shown that the Alpine staff members were deliberately indifferent to Jonathan harming himself. *Thus*, the Kings have not demonstrated that Jonathan's suicide was caused by a violation of his substantive due process rights, and their § 1983 claims necessarily fail. *Accordingly*, we affirm the trial court's grant of summary judgment to Pioneer RESA.

(Pet. App. 2a) (emphasis added).

Respondent relies largely on a two-word sentence at the end of another introductory paragraph in the appellate opinion:

> The Kings contend that the trial court erred in granting summary judgment to Pioneer RESA as to their § 1983 claims. Specifically, they argue that questions of material fact

---

(Pet. App. 15a-16a) (emphasis added). If the Court of Appeals had actually resolved the affirmative duty issue, the second sentence would have begun with the counter-factual conditional phrase "Accordingly, even if we had concluded that."

> remain as to whether Pioneer RESA had an affirmative duty, under the due process clause of the Fourteenth Amendment, to prevent Jonathan from harming himself and that such questions also remain as to whether Pioneer RESA's conduct, policies, and employee training procedures demonstrated a deliberate indifference to that duty. We disagree.

(Pet. App. 9a; see R.Br. 8).

This sentence is not sufficient, in the context of the opinion as a whole, to satisfy the *Long* "plain statement" requirement. It is unclear whether the court is asserting that there were no factual disputes at all, or that the disputed factual issues were not material. Disputes about any of these factual issues would indeed have been immaterial in light of the Court of Appeals' conclusion that the plaintiffs' claims against Pioneer were barred by *Heller* regardless of whether there had been a violation of Jonathan's constitutional rights. Respondent suggests that the referenced facts might also have been deemed immaterial for a second reason, and speculates that the unarticulated additional reason was a construction of *DeShaney*. But nothing in the body of the opinion supports that contention.

Following the decision of the Court of Appeals, plaintiffs sought certiorari in the Supreme Court of Georgia. That state court petition asked the Georgia Supreme Court to decide two distinct questions, whether the Court of Appeals had misapplied *Heller*[7] and whether Pioneer had an affirmative constitutional duty to protect Jonathan.[8] Respondent asserts that because the Georgia Supreme Court was asked to hear the two issues, plaintiffs necessarily "understood that they had lost in the Court of Appeals on *both* grounds." (Br. Opp. 10) (emphasis in original). That is not correct. The state certiorari petition expressly stated to the contrary that the Court of Appeals had *not* addressed the second issue.

---

[7] Petition for Writ of Certiorari, *King v. Pioneer Regional Educational Service Agency*, No. S10C0634, at 9:

> Whether the COA erred by holding that the King's claim that Pioneer's deficient policies, procedures, practices, and customs caused a violation of Jonathan's constitutional rights under *Monell* [*v. Department of Social Services*, 436 U.S. 658 (1978)] necessarily fails because the Kings did not show that Trotter and Jackson independently and individually violated Jonathan's constitutional rights.

The state court petition's analysis of this issue rested heavily on *Heller*. *Id.* at 14-18.

[8] *Id.*:

> Whether Pioneer had an affirmative duty to protect Jonathan King that arose when its employees locked Jonathan in a concrete seclusion room and held him there against his will, and whether a reasonable jury could conclude that Pioneer violated that duty.

> The COA assumed without deciding that Pioneer owed Jonathan an affirmative duty of care because it confined him to the seclusion room.... The COA dodged this issue, assuming but not deciding that Pioneer owed Jonathan an affirmative duty.[9]

In its brief opposing review by the Georgia Supreme Court, respondent did not dispute this characterization of the Court of Appeals opinion.[10]

---

[9] *Id.* at 8-11; see *id.* at 3 ("the Court of Appeals refused to consider whether *Pioneer's* custom, policy, or practice caused Jonathan's injury. Instead, the court found that the King's failure to show that Trotter and Doug Jackson ... personally violated Jonathan's constitutional rights ... barred their claim against Pioneer"), 11-12 ("instead of assuming the existence of such a duty, the COA should have expressly found that one existed").

Similarly, although the Petition asserted that *Heller*-related question was whether "the COA erred" in holding that liability on the part of Pioneer required a showing that an individual employee had committed a violation, the Petition's description of the affirmative duty question made no reference to any COA error or decision. See nn.7 and 8, *supra*.

[10] Response to Petition for Certiorari, *King v. Pioneer Regional Education Service Agency*, No. S10C0634, at 18-22.

Following the Court of Appeals decision, plaintiffs sought reconsideration in that court of the *Heller* issue; plaintiffs did not seek "reconsideration" regarding the affirmative duty issue because that issue had not been resolved by the Court of Appeals. Motion for Reconsideration, *King v. Pioneer Regional Educational Service Agency*, Appeal No. A09A1567. In its response to the Motion for Reconsideration, Pioneer did not suggest, as it does in this Court, that the Court of Appeals decision also rested on a determination that Pioneer did not owe Jonathan King any affirmative duty. Response to Motion for

(Continued on following page)

Respondent appears to suggest that the trial court decision on the affirmative duty issue is now "law of the case" under Georgia law, even if it was never addressed by the Court of Appeals. (Br. Opp. 11-12). But under Georgia law only a "ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent proceedings in that case." O.C.G.A. § 9-11-60(h). Because the Court of Appeals did not address this issue in its decision, that court (and the Georgia Supreme Court) would be free to do so on remand.

Finally, respondent argues that the trial court's holding that Pioneer had no constitutional duty to protect Jonathan is "unreversed" (Br. Opp. 10) and "undisturbed." (Br. Opp. 8). But that is true only because the Court of Appeals did not reach this issue, not because the Court of Appeals reached the question and upheld the decision of the trial court.

Reconsideration on Behalf of Appellee Pioneer RESA, *King v. Pioneer Regional Educational Service Agency*, Appeal No. A09A1567.

III. THE EXISTENCE OF UNRESOLVED DEFENSE CONTENTIONS DOES NOT PRECLUDE REVIEW OF THE QUESTION PRESENTED

Respondent argues that there are perhaps a dozen other grounds on which it may ultimately prevail on remand. (Br. Opp. 13-29). Respondent does not, however, contend that the Court of Appeals addressed any of these additional contentions; it asserts only that on remand many other arguments for dismissing the complaint would still be "available." (Br. Opp. 14).

The existence of such unresolved contentions is not a basis for denying review. Where a lower court has granted summary judgment or dismissed a civil or criminal proceeding, it will usually be the case that the defendant also has additional as yet unadjuciated arguments on which it could ultimately prevail. That ever present possibility has never been grounds for denying certiorari.

Respondent proffers a range of fact-bound arguments about the merits of its various alternative defenses, and invites the Court to deny the petition based on a forecast about how the Georgia courts might rule on those contentions when they have been fully briefed and argued on remand. It is not the practice of this Court to engage in such speculation. Indeed, the Court "may review a state case decided on a federal ground even if it is clear there was an available state ground on which the state court *could*

properly have relied." *Michigan v. Long*, 463 U.S. at 1039 n.4. (Emphasis added).

CONCLUSION

For the above reasons, this Court should grant a writ of certiorari to review the judgment and opinion of the Georgia Court of Appeals for the Third Division.

Respectfully submitted,

ERIC SCHNAPPER*
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@u.washington.edu

E. WYCLIFFE ORR, SR.
SPENCE JOHNSON
DUSTIN MARLOWE
ORR BROWN JOHNSON LLP
P.O. Box 2944
Gainesville, GA 30505
(770) 534-1980

Attorneys for Petitioners

**Counsel of Record*